This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

Stanford University Libraries
3 6105 127 803 943

3166 13

THE

EXECUTIVE DOCUMENTS

OF THE

SENATE OF THE UNITED STATES

FOR THE

SECOND SESSION OF THE FIFTY-THIRD CONGRESS.

1893-94.

Volume 1.—Nos. 1 to 74, inclusive, except No. 19, parts 1 and 2, and No. 36.
Volume 2.—No. 19, parts 1 and 2, Coast and Geodetic Survey.
Volume 3.—No. 36, Proceedings of the Pan-American Medical Congress.
Volume 4.—Nos. 75 to 176, inclusive, except Nos. 97 and 119.
Volume 5.—No. 97, Des Moines River Land Grant.
Volume 6.—No. 119, Reports relating to Military Engineering.
Volume 7.—No. 177, Fur Seal Fisheries Arbitration.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1895.

LELAND STANFORD JUNIOR
LIBRARY
UNIVERSITY
F120570

INDEX

TO

THE EXECUTIVE DOCUMENTS

OF THE

SENATE OF THE UNITED STATES

FOR THE

SECOND SESSION OF THE FIFTY-THIRD CONGRESS, 1893-94.

Subject.	No.	Vol.
A.		
Agriculture, Secretary of. Letters:		
Pine seed, native. Information relative to experiments in planting, in the sand hills of the Northwest	172	4
Wheat. Relative to the visible and invisible supply of, in the United States	72	1
Wheat. Statement of supply of, visible and invisible, likely to be in the United States July 1, 1894	125	4
Alaska:		
Dr. Sheldon Jackson on introduction of reindeer into	70	1
That last year's unexpended balance for protection of salmon fisheries in, be embraced in the sundry civil bill	112	4
Aliens. Showing the percentage of, among the officers and enlisted men of the U. S. Army	176	4
Allen, James. Report of Capt. M. A. Healy of the rescue of the crew of wrecked bark	143	4
American Republics. Annual Report of Director of Bureau of, for 1893	43	1
Annapolis and Elk Ridge R. R. Co. Report of Second Comptroller relative to settlement No. 5441 in favor of the	118	4
Appropriations. Relative to certain items in the legislative, executive, and judicial bill (H. R. 7097)	108	4
Argentine Republic:		
Coined silver money and the products of	62	1
Relative to the currency and the products of	91	4
Arkansas Volunteers. Relative to pensions issued for services in David West's Company B of	40	1
Army:		
Reports of officers of the, serving on the frontier in 1855 and 1856	113	4
Showing the percentage of aliens among the officers and enlisted men of the	176	4
Assistant treasurers and customs officers of the United States. Relative to form of bill for continuing in office	49	1
Attorney-General. Letters:		
Bailiffs. Relative to appropriation for payment of	100	4
Court of Claims. List of judgments of the, in Indian depredation cases, since July 1, 1892	82	4
Court of Claims. List of judgments of, in Indian depredation cases, since April 14, 1894	128	4

Subject.	No.	Vol.
Attorney-General. Letters—Continued.		
Department of Justice. Submitting statement of deficiency in contingent expenses of the	155	4
Election laws. Number of indictments found for violations of, since 1870	23	1
Fox and Wisconsin rivers, overflow cases. List of judgments in, not appealed, etc	90	4
Indian depredations. Statements of all final judgments in claims arising from, to Dec. 4, 1893	7	1
Indian depredations. Two judgments in cases omitted from Senate Ex. Doc. No. 7. (Part 2)	7	1
Indian depredation cases. Relative to persons employed by the Government in defense of	83	4
Indian depredation claims. Report from assistant charged with the defense of	96	4
Indian Territory. Requesting appropriation of $500 for expenses of the judge of the U. S. court in the	131	4
Judgments. List of, rendered against the United States by U. S. circuit and district courts	149	4
Kidwell Flats. Relative to suit in regard to the	86	4
Letter carriers. Amount of judgments in the Court of Claims in favor of	144	4
Marshals, U. S. courts. Requesting additional appropriations for expenses of, in protecting property in the hands of receivers	140	4
Marshals, U. S. courts. Increasing estimate of deficiency in appropriation for fees and expenses of, for current fiscal year	120	4
Monopolies, unlawful. Action taken in U. S. courts to punish persons engaged in	107	4
Pacific railroads. Estimate of appropriation to enable the Attorney-General to protect the Government's interest in suits affecting the	138	4
Silver certificates. Reply to inquiry of Acting Secretary of the Treasury relative to character of, as money	48	1
Sioux mixed bloods. Correspondence relative to	59	1
Trade. Action taken in U. S. courts to punish persons engaged in restraints of	101	4
Utah. Large sums due the United States from, for support of convicts in	18	1
Witnesses. United States attorney for Washington relative to deficiency estimate of $400,000 for	55	1
Attorneys, United States, in New York. Amounts paid to, for examining titles to land	22	1
B.		
Bailiffs. Relative to appropriation for payment of	100	4
Berner, Robert L., special agent. Report of, relative to entries within the limits of the Des Moines River land grant	97	5
Bluefields, Nicaragua. Report of Secretary of State relative to landing of British troops at	64	1
Bonds. Information relative to the sale of, under notice of Jan. 17, 1894	38	1
Boston Harbor. Relative to providing additional safeguards to approach of vessels to	30	1
Boston. Report of investigation of appraiser's office at	69	1
Bounty. Amount of, paid to sugar producers from July 1, 1891, to Mar. 1, 1894	61	1
British troops. Secretary of State relative to landing of, at Bluefields, Nicaragua	64	1
C.		
Cable. Correspondence concerning permission to land, on United States coast since Mar. 1, 1893	14	1
California. Third Auditor relative to the Indian war claims of the State of	84	4

Subject.	No.	Vol.
Canada:		
Relative to number, etc., of railway cars passing between United States ports, through the Dominion of, since 1885	33	1
Commercial relations between the Dominion of, and the United States since 1821	106	4
Carter, John L. Claims of, against Spain, for illegal arrest	16	1
Castine. Relative to making certain repairs on the gunboat	34	1
Census:		
Commissioner of Labor explaining why report on manufactures has not been published	52	1
Relative to compliance of the sugar refineries with requirements of the	76	4
Cherokee Outlet. Reports relative to selection of county seats and town sites in the	37	1
Chicago and Rock Island R. R. Selection of county seats and town sites along the line of the, in the Cherokee Outlet	37	1
Chickasaw trust fund. Stating the interest account of nonpaying bonds in the	60	1
Chinese exclusion act. Secretary of the Treasury suggesting that last year's unexpended balance for the enforcement of the, be embraced in sundry civil bill	111	4
Claims:		
Schedules of, allowed by accounting officers of the Treasury, for payment of which appropriations have been exhausted	152	4
Schedules of, allowed by accounting officers, for payment of which appropriations have been exhausted	164	4
Coast and Geodetic Survey. Report of Superintendent of the, for year ended June 30, 1893	19	2
Colleges. Disbursements for current fiscal year of portion of proceeds from sale of public lands to endowment and support of	122	4
Colombia, United States of. Correspondence between the Government of, and Secretary of State relative to levying import duties on certain products of	56	1
Columbia Arsenal, Tenn. Communication from Chief of Ordnance relative to claim of Frank Goodwin, contractor for constructing certain buildings at the	71	1
Columbia River. Relative to necessity for a quarantine station at the mouth of the	130	4
Commissions. Form of bill for issuing and recording in Treasury Department	50	1
Comptroller, First. Showing accounts audited against Utah Territory for years 1875–1886	80	4
Comptroller of the Currency. Relative to appropriation of $5,000 for suppressing counterfeiting	87	4
Consulates, United States. First Comptroller of the Treasury asking additional appropriation for contingent expenses of	163	4
Contract laborers. Relative to violations of statutes against importation of	102	4
Convicts. Large sums due the United States from Utah for support of	18	1
Counterfeiting:		
Chief of Secret Service relative to appropriation for suppressing	88	4
Comptroller of the Currency relative to appropriation of $5,000 for suppressing	87	4
Court of Claims:		
Amount of judgments in the, against the United States in favor of letter carriers	144	4
List of judgments of the, from Mar. 4, 1893, to Dec. 19, 1893	11	1
List of judgments of the, in Indian depredation cases since July 1, 1892	82	4
List of judgments of, in Indian depredation cases since Apr. 14, 1894	128	4
List of judgments of the, requiring an appropriation at this session	145	4
List of judgments of the, requiring an appropriation to pay	161	4
Courts, U. S. List of judgments rendered by, against the United States	149	4

Subject.	No.	Vol.
Crow Creek Indian Reservation. Commissioners of Indian Affairs relative to reimbursement of settlers on, in South Dakota	32	1
Currency, paper. Amount of, redeemed and reissued or destroyed since Jan. 14, 1875	47	1
Currency. Relative to the, and products of India, Russia, and Argentine Republic	91	4
Customs officers:		
Relative to form of bill for continuing in office, etc	49	1
Relative to payment of, for services rendered after expiration of their commissions	63	1
D.		
Departments, Executive. Estimates of appropriation required by the, to complete service for the fiscal year ended June 30, 1894	148	4
Depreciated paper. Relative to cash value of imports from countries having, as a circulating medium	95	4
Deputy surveyors. Report of Commissioner of the General Land Office relative to cause of delay in adjusting accounts due	168	4
Des Moines River land grant. Report of Robert L. Berner, special agent, relative to entries within limits of the	97	5
Devils Island, Lake Superior. Secretary of the Treasury recommending appropriation for obtaining title to, for a light station	160	4
District of Columbia:		
Attorney-General relative to suit in regard to Kidwell Flats, in the	86	4
Chief of Engineers relative to use of water power of the Great Falls of the Potomac for electric lighting in the	154	4
E.		
Election laws. Number of indictments found for violations of, since 1870	23	1
Election services. Amounts paid Special Deputy Marshal J. W. Jacobus for, in New York City, Nov. 8, 1892	1	1
Engraving and Printing:		
Chief of Bureau of, relative to purchase of supplies for the Bureau of	17	1
Secretary of the Treasury submitting estimate for an appropriation for	159	4
Ernst, O. H., Superintendent. Relative to construction of new reservoir at the Military Academy	99	4
Everett Harbor. Chief of Engineers relative to	53	1
Everett, Wash. Report of Chief of Engineers relative to cost of dredging the bar at	139	4
F.		
First Auditor's Office. Estimates for additional force in the, if a tax should be imposed on incomes	141	4
Fish hatcheries. Estimates for completing, in Lake County, Colo., and in New York	124	4
Fox and Wisconsin rivers overflow cases. List of judgments in, not appealed, etc	90	4
Freight on bullion and coin. Director of the Mint presenting deficiency estimate in appropriation for, between mints and assay offices	146	4
Frontier. Reports of Army officers serving on the, in 1855 and 1856	113	4
Furniture. Deficiency appropriation of $600 for traveling expenses of inspector of, for public buildings	8	1
Fur Seal Fisheries Arbitration	177	7
G.		
Gold coin:		
Sources from whence supply of, in this country, outside the Treasury, was increased in 1893	26	1

Subject.	No.	Vol.
Gold coin—Continued.		
Statement of amount of, received by the Treasury since Nov. 1, 1893, etc	134	4
Gold reserve. Relative to the establishment and maintenance of the	47	1
Goodwin, Frank. Chief of Ordnance relative to claim of	71	1
Grassy Island, Detroit River, Michigan. Secretary of the Treasury asking additional appropriation to complete range lights above	142	4
Great Falls of the Potomac. Chief of Engineers relative to use of water power of the, for electric lighting in the District of Columbia	154	4
H.		
Haiti. Correspondence between the Government of, and Secretary of State relative to levying import duties on certain products of	56	1
Hardy, W. L. Claim of, against Spain for illegal arrest	16	1
Hawaii:		
Additional dispatches, etc., relating to	46	1
Additional dispatches from the U. S. minister to, with inclosures	57	1
Dispatches from U. S. minister to	77	4
Dispatches from the U. S. minister to	117	4
Dispatch from the U. S. minister to	156	4
Message of the President transmitting sundry correspondence relative to	13	1
Secretary of State transmitting dispatch and inclosures from U. S. minister to	65	1
Secretary of State transmitting dispatch from U. S. minister to	85	4
Secretary of State transmitting dispatches from U. S. minister to	92	4
Secretary of State transmitting dispatch from the U. S. minister to	103	4
Hay Lake Channel. Relative to provision for lighting the, St. Marys River, Michigan	79	4
Healy, Capt. M. A. Report of, concerning rescue of crew of the wrecked bark James Allen	143	4
Heard, John T. Commissioner of Indian Affairs relative to claim of	20	1
Holland, Wm. T. Claim of, against Spain for illegal arrest	16	1
Homes for disabled soldiers and sailors. Estimate of deficiency in the appropriation for	137	4
Hoopa Valley Indian Reservation. Relative to construction of wagon road on the	41	1
Hospital service, Government. Value of textile fabrics purchased for the, during fiscal year 1893	39	1
I.		
Immigration. Commissioners of, with dates of appointment and amount of salary	44	1
Immigration fund. Receipts and disbursements of the, yearly, since 1889, etc	54	1
Immigration:		
Report of Superintendent of, relative to the padrone system of Italian	114	4
Report of Superintendent of, relative to restrictions applicable to	166	4
Import duties. Correspondence between Secretary of State and sundry foreign governments, relative to, on certain products	56	1
Imports. Cash value of, from countries having depreciated paper as circulating medium	95	4
Income tax:		
Amount of revenue derived from the, from 1863 to 1873	10	1
Estimates for additional force in the First Auditor's Office, if the, should be imposed	141	4
India:		
Coined silver money and the products of	62	1
Relative to the currency and the products of	91	4
Indian Affairs, Commissioner of. Letters:		
Relative to claim of John T. Heard	20	1
Relative to treaties with Yankton and Dakota, or Sioux Indians	27	1
Relative to reimbursement of settlers on Crow Creek and Winnebago Reservation, S. Dak	32	1

Subject.	No.	Vol.
Indian Affairs, Commissioner of. Letters—Continued.		
Relative to construction of wagon road on Hoopa Valley Indian Reservation	41	1
Relative to Sioux mixed bloods	59	1
Submitting copy of agreement with the Yakima Nation of Indians.	67	1
Relative to the Yuma Indians	68	1
Relative to the Indian agencies of the United States	75	4
Relative to the money due and paid, by treaty to the Wahpaykootey and Medawakantan bands of Sioux Indians	94	4
Relative to survey of the Klamath Indian Reservation	129	4
Relative to the Indian wars of 1855 and 1856, in Washington and Oregon	135	4
Indian agencies. Commissioner of Indian Affairs, relative to the	75	4
Indian appropriation bill. Estimates for the, for the current fiscal year	136	4
Indian depredation cases:		
Relative to persons employed by the Government in defense of	83	4
List of judgments of Court of Claims in, since Apr. 14, 1894	128	4
Indian depredation claims. Report from Assistant Attorney-General, charged with the defense of	96	4
Indian depredations:		
List of judgments of the Court of Claims for, since July 1, 1892	82	4
Statement of all final judgments in claims arising from, to Dec. 4, 1893	7	1
Two judgments in cases omitted from Senate Ex. Doc. No. 7, (Part 2)	7	1
Indian reservations. Secretary of the Interior urging appropriation for surveying and allotting for fiscal year 1894	42	1
Indian River, Florida. Cost of dredging channel from the, to certain point	3	1
Indians:		
Agreement with the Nez Perce tribe of, in Idaho, etc	31	1
Amount paid to Chickasaw tribe of, as interest on trust funds	45	1
Relative to money due and paid, by treaty, to the Wahpaykootey and Medawakanton bands of Sioux	94	4
Rogue River. Commissioner of Indian Affairs relative to the loyalty of the, during the Washington and Oregon Indian wars of 1855 and 1856	135	4
Western Cherokee. Commissioner of Indian Affairs relative to claim of John T. Heard for services rendered the	20	1
Yankton and Dakota, or Sioux. Commissioner of Indian Affairs relative to treaties with the	27	1
Yakima Nation of. Secretary of Interior transmitting copy of agreement with	67	1
Indian Territory. Attorney-General requesting appropriation of $500 for expenses of the judge of the U. S. court in the	131	4
Indian war claims. Third Auditor relative to the, of California	84	4
Indian wars, Washington and Oregon, of 1855 and 1856. Report of Commissioner of Indian Affairs relative to the	135	4
Interior Department. List of appointments, promotions, dismissals, and resignations by request in the, from Mar. 4, 1893, to Apr. 19, 1894	105	4
Interior, Secretary of the. Letters:		
Alaska. Report of Dr. Sheldon Jackson on introduction of reindeer into	70	1
Arkansas Volunteers. Relative to pensions issued for services in David West's Company B of	40	1
Cherokee Outlet. Reports relative to selection of county seat and town sites in the	37	1
Colleges. Disbursements for current fiscal year of portion of proceeds from sale of public lands to endowment and support of	122	4
Deputy surveyors. Report of Commissioner of the General Land Office relative to cause of delay in adjusting accounts due	168	4
Des Moines River land grant. Report of Robert L. Berner, special agent, relative to entries within limits of the	97	4
Heard, John T. Commissioner of Indian Affairs relative to claim of.	20	1

Subject.	No.	Vol.
Interior, Secretary of the. Letters—Continued.		
Hoopa Valley Indian Reservation. Relative to construction of wagon road on the	41	1
Indian Affairs, Commissioner of. Relative to reimbursement of settlers on Crow Creek and Winnebago Reservation, S. Dak	32	1
Indian agencies. Commissioner of Indian Affairs relative to the	75	4
Indian appropriation bill. Submitting certain estimates for the	136	4
Indian reservations. Urging appropriation for surveying and allotting, for fiscal year 1894	42	1
Indians. Agreement with the Nez Perce tribe of, in Idaho, etc	31	1
Indians. Relative to money due and paid, by treaty, to the Wahpacootey and Medawakantan bands of Sioux	94	4
Indians, Yankton and Dakota, or Sioux. Commissioner of Indian Affairs relative to treaties with the	27	1
Indians, Yakima Nation of. Transmitting copy of agreement with	67	1
Indian wars, Washington and Oregon, of 1855 and 1856. Report of Commissioner of Indian Affairs relative to the	135	4
Interior Department. List of appointments, promotions, dismissals, and resignations by request in the, from Mar. 4, 1893, to Apr. 19, 1894	105	4
Klamath Indian Reservation, Oreg. Relative to the survey of the	129	4
Manufactures. Why the census report on, has not been published	52	1
Minnesota. Correspondence respecting the claim of the State of, to school lands in Indian or military reservations	174	4
Nicaragua. Report of Maritime Canal Company of	5	1
Pensions. Amount of unexpended appropriation for, at close of fiscal year 1894	116	4
Pensions, Commissioner of. Relative to number of pensions suspended since Mar. 4, 1893, and number restored, etc	121	4
Public Lands. Report of Commissioner of General Land Office relative to odd sections of, in Oregon and Washington	81	4
Rent of buildings. Estimate of deficiency in the appropriation for, Department of the Interior	162	4
Sioux mixed bloods. Commissioner of Indian Affairs and Attorney-General relative thereto	59	1
Sugar refineries. Relative to compliance of the, with census requirements	76	4
Union Pacific Railway Company. Report of Government Directors of the	4	1
Utah. Annual report of commissioner of schools for	24	1
Yuma Indians. Report from Commissioner of Indian Affairs relative to the, and copy of agreement with	68	1
Italian ambassador. Correspondence with the, relative to the padrone system in connection with Italian immigration	114	4
Italian immigration. Correspondence relative to the padrone system in connection with	114	4
J.		
Jackson, Dr. Sheldon. Report of, on introduction of reindeer into Alaska	70	1
Jacobus, J. W., special deputy marshal. Amount paid to, for election services in New York City, Nov. 8, 1892	1	1
Judgments. List of, rendered against the United States by U. S. circuit and district courts	149	4
Justice, Department of. Statement of deficiency in contingent expenses of the	155	4
K.		
Kidwell Flats. Relative to suit in regard to the	86	4
Klamath Indian Reservation, Oreg. Commissioner of Indian Affairs relative to the survey of the	129	4
L.		
Labor, Commissioner of. Explaining why census report on manufactures has not been published	52	1

Subject.	No.	Vol.
Labor, Commissioner of. Letter from, relative to compliance of sugar refineries with certain provisions of the act for taking the Eleventh and subsequent censuses	76	4
Land Office, Commissioner of the General. Relative to public lands in odd sections in Oregon and Washington	81	4
Lands, public. Disbursements for current fiscal year of portion of proceeds from sale of, to endowment and support of colleges	122	4
Letter carriers. Amount of judgments in the Court of Claims against the United States in favor of	144	4
Light-House Board. Extracts from report of the, relative to Boston Harbor	30	1
Light station. Secretary of the Treasury recommending appropriation for obtaining title to Devil's Island, Lake Superior, for a	160	4
M.		
Mackinac Island, Mich. Claim of postmaster at, for losses by burglary	21	1
Mackinac National Park. Report of Capt. Charles T. Witherell, superintendent of the, for 1893	29	1
Manufactures. Commissioner of Labor explaining why census report on, has not been published	52	1
Maple sugar. Gross amount of bounty paid to producers of	61	1
Marine-Hospital Service:		
Secretary of the Treasury requesting appropriation for additional clerk for office of Supervising Surgeon-General of the	123	4
Secretary of the Treasury requesting appropriation of $35,000 to meet expenses of additional duties, etc	167	4
Marshals, U. S. courts:		
Attorney-General increasing estimate of deficiency in appropriation for fees and expenses of, for current fiscal year	120	4
Attorney-General requesting additional appropriation for expenses of, in protecting property in hands of receivers	140	4
Massachusetts avenue. Superintendent of Naval Observatory relative to extension of	9	1
Medical Congress, Pan-American. Proceedings of the, held in Washington, September, 1893	36	3
Military Academy. O. H. Ernst, Superintendent, relative to construction of new reservoir at the	99	4
Military engineering. Proceedings of the World's Congress Auxiliary relating to	119	6
Military records. Transfer of, of Revolution and War of 1812 to War Department from Treasury and Interior Departments	65	1
Minneapolis, Minn. Cost of locks and dams to extend navigation to the flour mills at	109	4
Minnesota. Correspondence respecting the claim of the State of, to school lands within Indian or military reservations	174	4
Mint, Director of the:		
Urging deficiency appropriation of $46,000 to pay workmen at the mint in Philadelphia	78	4
Submitting deficiency estimate in appropriation for freight on bullion and coin between mints and assay offices	146	4
Submitting deficiency estimate in appropriation for contingent expenses of the mint at Philadelphia	147	4
Mississippi River. Danger of the, cutting through into the St. Francis River at Walnut Bend, Ark	104	4
Monopolies, unlawful. Action taken in U. S. courts to punish persons engaged in	101	4
Mora, Antonio Maximo. Correspondence since June 16, 1892, relative to claim of, against Spain	115	4
N.		
Naval Observatory. Superintendent of the, relative to extension of Massachusetts avenue through the grounds of the	9	1
Navajo Indians. Estimate of appropriation for the relief of the, in New Mexico	170	4

Subject.	No.	Vol.
Navy, Secretary of the. Letters:		
Castine. Relative to making certain repairs on the gunboat	34	1
Naval Observatory. Letter from superintendent of the, relative to extending Massachusetts avenue through the grounds of the	9	1
Rodney, Robert B., paymaster in the Navy. Opinion of Attorney-General and decision of district court of Delaware with respect to	35	1
Newport News, Va. Relative to claim of Irwin Tucker, late postmaster at	73	1
New York. Allowances made to the State of, under act of July 27, 1861.	25	1
New York Harbor. Estimate for preventing injurious deposits in, for current fiscal year	127	4
Nicaragua. Report of Maritime Canal Company of	5	1
Nicaragua Canal. Report of Capt. George P. Scriven on the military aspects of the	74	1
O.		
Ordnance, Bureau of. Lists of amounts found due by the accounting officers for contingent expenses of the	165	4
Ordnance, Chief of. Relative to claim of Frank Goodwin, contractor.	71	1
Oregon. Commissioner of Indian Affairs relative to Indian wars of 1855 and 1856 in	135	4
Osceola. Report of Second Comptroller relative to insurance paid on the steamer	133	4
P.		
Pacific Railroads. Estimate of appropriation to enable the Attorney-General to protect the Government's interest in suits affecting the	138	4
Padrone system. Correspondence relative to the, in connection with Italian immigration	114	4
Pan-American Medical Congress, held in Washington September, 1893. Proceedings of the	36	2
Pensioners. Third Auditor relative to claims for expenses of last illness and burial of	89	4
Pension Office building. Estimate of cost of new copper roof for the.	150	4
Pensions:		
Amount of unexpended appropriation for, at close of fiscal year 1894	116	4
Commissioner of. Relative to, issued for services of David West's Company B, Arkansas Volunteers, 1846	40	1
Commissioner of. Relative to number of suspended, since Mar. 4, 1893, and number restored, etc	121	4
Philadelphia:		
Director of the Mint urging deficiency appropriation of $46,000 to pay workmen at the mint in	78	4
Director of the Mint presenting deficiency estimate in appropriation for contingent expenses of the mint at	147	4
Pine seed, native. Secretary of Agriculture relative to experiments in planting, in the sand hills of the Northwest	172	4
Portland, Oreg. Papers and correspondence relative to claim of	15	1
Postal revenues. Statement of deficiency in the, for 1893	165	4
Postal service. Estimate of appropriation required to complete the, for fiscal year ended June 30, 1894	148	4
Postmaster-General. Letters:		
Mackinac Island, Mich. Claim of postmaster at, for losses by burglary	21	1
Senate mail. Relative to the delay in the delivery of the	151	4
Tucker, Irwin. Relative to claim of, late postmaster at Newport News, Va	73	1
Union Building. Relative to rental of part of basement of	12	1
President of the United States. Messages:		
American Republics. Transmitting Annual Report of Director of the Bureau of, for 1893	43	1

Subject.	No.	Vol.
President of the United States. Messages—Continued.		
Bluefields, Nicaragua. Report of Secretary of State relative to landing of British troops at	64	1
Coined silver money. Secretary of State with respect to, and products of India, Russia, and the Argentine Republic	62	1
Hawaii. Additional dispatches, etc., relating to	46	1
Hawaii. Additional dispatches from the U. S. minister to, with inclosures	57	1
Hawaii. Transmitting correspondence relative to	13	1
Hawaii. Secretary of State transmitting dispatch and inclosures from U. S. minister to	65	1
Hawaii. Secretary of State transmitting dispatches received from U. S. minister to	77	4
Hawaii. Secretary of State transmitting dispatch from U. S. minister to	85	4
Hawaii. Secretary of State transmitting dispatches from U. S. minister	92	4
Hawaii. Secretary of State transmitting dispatch from the U. S. minister to	103	4
Hawaii. Secretary of State transmitting dispatches from the U. S. minister to	117	4
Hawaii. Secretary of State transmitting a dispatch from the U. S. minister to	156	4
Import duties. Correspondence between Secretary of State and sundry foreign governments relative to, on certain products	56	1
Mora, Antonio Maximo. Correspondence since June 16, 1892, relative to claim of, against Spain	115	4
Samoan Islands. Secretary of State transmitting report relative to the	93 132	4 4
Secretary of State. Report of, on claim of persons against Spain for illegal arrest off the coast of Yucatan	16	1
Sugar. Secretary of State relative to probable retaliation of foreign governments for the proposed duty on	126	4
Virginius indemnity fund. Secretary of State relative to the condition of the	58	1
Yorke, Louis A. Vetoing an act for the relief of (S. 1438)	173	4
Property unoccupied. Secretary of the Treasury recommending the sale of certain pieces of	158	4
Public lands. Report of Commissioner of General Land Office relative to odd sections of, in Oregon and Washington	81	4
Q.		
Quarantine. Secretary of the Treasury relative to amending the present laws affecting	169	4
Quarantine station. Relative to necessity for a, at the mouth of the Columbia River	130	4
R.		
Railway cars. Relative to number of, etc., passing between United States ports, through Canada, since 1885	33	1
Rent of buildings. Estimate of deficiency in the appropriation for, Interior Department	162	4
Revenue. Amount of, derived from the income tax from 1863 to 1873	10	1
Revenues. Estimate of, under the new tariff bill, and the effect upon the, of placing sugar on the free list	175	4
Revolution. Transfer of military records of the, from Treasury and Interior to War Department	66	1
Rodney, Robert B., paymaster in the Navy. Opinion of Attorney-General and decision of district court of Delaware with respect to	35	1
Russia:		
Coined silver money and the products of	62	1
Relative to the currency and the products of	91	4

Subject.	No.	Vol.
S.		
Saint Francis River. Danger of the Mississippi River cutting through into the, at Walnut Bend, Arkansas	104	4
Saint Marys River, Michigan. Relative to provision for lighting Hay Lake Channel in the	79	4
Salmon fisheries. Secretary of the Treasury suggesting that last year's unexpended balance for protection of the, in Alaska, be embraced in the sundry civil bill	112	4
Samoan Islands:		
Report of Secretary of State relative thereto	93	4
Report of Secretary of State relative to the	132	4
Sandy Hook. Suggesting appropriation for constructing a sea wall at	110	4
School lands. Correspondence respecting the claim of the State of Minnesota to, within Indian or military reservations	174	4
Scriven, Capt. George P. Report of, relative to the military aspects of the Nicaragua Canal	74	1
Secret Service, Chief of the. Relative to appropriation for suppressing counterfeiting	88	4
Senate mail. Postmaster-General relative to the delay in the delivery of the	151	4
Silver. Secretary of State with respect to coined, money and products of India, Russia, and Argentine Republic	62	1
Silver bullion. Aggregate amount of, purchased in October, 1893	6	1
Silver certificates. Opinion of Attorney-General as to lawful character of, as money	48	1
Silver coins. Secretary of the Treasury recommending an appropriation of $300,000 for the recoinage of uncurrent fractional	171	4
Sioux mixed bloods. Commissioner of Indian Affairs and Attorney-General relative to	59	1
Spain:		
Claim of W. L. Hardy, John L. Carter, and William T. Holland against, for illegal arrest	16	1
Correspondence since June 16, 1892, relative to claim of Antonio Maximo Mora against	115	4
Springfield, Mass. Amount expended at the U. S. armory at, during year ending June 30, 1893	2	1
State, Secretary of. Letters:		
American Republics. Annual Report of Director of the Bureau of, for 1893	43	1
Bluefields, Nicaragua. Relative to landing of British troops at	64	1
Cable. Correspondence concerning permission to land, on United States coast since Mar. 1, 1893	14	1
Coined silver money. Relative to, and products of India, Russia, and the Argentine Republic	62	1
Hawaii. Additional dispatches, etc., relating to	46	1
Hawaii. Transmitting to the President sundry correspondence relative to	13	1
Hawaii. Transmitting dispatch and inclosures from U. S. minister to	65	1
Hawaii. Transmitting dispatches received from U. S. minister to	77	4
Hawaii. Transmitting dispatch from U. S. minister to	85	4
Hawaii. Transmitting dispatches from U. S. minister to	92	4
Hawaii. Transmitting dispatch from the U. S. minister to	103	4
Hawaii. Transmitting dispatches from the U. S. minister to	117	4
Hawaii. Transmitting dispatch from the U. S. minister to	156	4
Import duties. Correspondence with sundry foreign governments relative to, on certain products	56	1
Medical Congress, Pan-American. Proceedings of the, held in Washington, September, 1893	36	3
Samoan Islands. Report relative to the	93 132	4 4
Spain. Claim of W. L. Hardy, John L. Carter, and Wm. T. Holland, against, for illegal arrest, etc	16	1
Sugar. Probable action of foreign governments in retaliation for the proposed duty on	126	4

Subject.	No.	Vol.
State, Secretary of. Letters—Continued.		
Virginius indemnity fund. Relative to the condition of the	58	1
Statistics, Bureau of. Statements showing commercial relations between Canada and the United States since 1821	106	4
Sugar:		
Effect upon the revenues of placing, upon the free list	175	4
List of producers of, and amount of bounty paid to each from July 1, 1891, to Mar. 1, 1894	61	1
Probable retaliation of foreign governments for the proposed duty on	126	4
Sugar refineries. Relative to compliance of the, with census requirements	76	4
Sundry civil bill:		
That last year's unexpended balance for enforcement of Chinese exclusion act be embraced in the	111	4
That last year's unexpended balance for protection of salmon fisheries in Alaska be embraced in the	112	4
Supplies and Accounts, Bureau of. List of amounts found due by accounting officers for contingent expenses of the	165	4
Swineford, A. P., special agent. Reports of, on selection of county seats and town sites in the Cherokee Outlet	37	1
T.		
Textile fabrics. Value of, purchased for the Government hospital service during fiscal year 1893	39	1
Titles to land. Amounts paid to U. S. attorneys in New York for examining	22	1
Trade. Action taken in U. S. courts to punish persons engaged in restraints of	101	4
Traveling expenses. Deficiency of $600 for, of inspector of furniture for public buildings	8	1
Treasury. Amount of gold coin received by the, since Nov. 1, 1893	134	4
Treasury Department:		
Form of bill for issuing and recording in the	50	1
Instructions issued by the, relative to the padrone system of Italian immigration	114	4
List of persons employed in the, during 1893	51	1
List of appointments, promotions, dismissals, resignations, and reductions in the, from Mar. 4, 1893, to Apr. 19, 1894	107	4
Statement showing names of persons employed as special agents of the	157	4
Schedule of claims allowed by accounting officers of the, for payment of which appropriations have been exhausted	152	4
Treasury, Secretary of the. Letters:		
Annapolis and Elk Ridge R. R. Co.: Report of Second Comptroller relative to settlement No. 5441 in favor of the	118	4
Appropriations. Relative to certain items in the legislative, executive, and judicial bill (H. R. 7097)	108	4
Assistant treasurers of the United States. Relative to form of bill for continuing in office	49	1
Attorneys, U. S., in New York. Amounts paid to, for examining titles to land, etc	22	1
Bonds. Information relative to the sale of, under notice of Jan. 17, 1894	38	1
Boston. Report of investigation of appraiser's office at	69	1
Boston Harbor. Relative to providing additional safeguards to approach of vessels	30	1
Canada. Commercial relations between the Dominion of, and the United States since 1821	106	4
Chickasaw trust funds. Stating the interest account of nonpaying bonds in the	60	1
Chinese exclusion act. That last year's unexpended balance for enforcement of the, be embraced in sundry civil bill	111	4
Claims. Schedules of, allowed by accounting officers, and for payment of which appropriations have been exhausted	152	4

Subject.	No.	Vol.
Treasury, Secretary of the. Letters—Continued.		
Claims. Schedules of, allowed by accounting officers, for payment of which appropriations have been exhausted	164	4
Coast and Geodetic Survey. Report of Superintendent of the, for year ended June 30, 1893	19	2
Columbia River. Relative to necessity for a quarantine station at the mouth of the	130	4
Commissions. Form of bill for issuing and recording, in Treasury Department	50	1
Consulates, U. S. First Comptroller of the Treasury asking additional appropriations for contingent expenses of	163	4
Contract laborers. Relative to violations of statutes against importation of	102	4
Counterfeiting. Comptroller of the Currency relative to appropriation of $5,000 for suppressing	87	4
Counterfeiting. Chief of Secret Service relative to appropriation for suppressing	88	4
Court of Claims. List of judgments of, from Mar. 4, 1893, to Dec. 19, 1893	11	1
Court of Claims. List of judgments of the, requiring an appropriation at this session	145	4
Court of Claims. List of judgments of the, requiring an appropriation to pay	161	4
Currency, paper. Amount of, redeemed and reissued or destroyed since Jan. 14, 1875	47	1
Currency. Relative to the, and products of India, Russia, and Argentine Republic	91	4
Customs officers. Relative to form of bill for continuing in office, etc	49	1
Customs officers. Relative to payment of, for services rendered after expiration of their commissions	63	1
Department of Justice. Attorney-General submitting statement of deficiency in contingent expenses of the	155	4
Departments. Estimates of appropriations to complete the service of the, for fiscal year ending June 30, 1894	148	4
Depreciated paper. Relative to cash value of imports from countries having, as circulating medium, etc	95	4
Devils Island, Lake Superior. Recommending appropriation for obtaining title to, for a light station	160	4
Employees. List of persons employed in the Treasury Department during 1893	51	1
Engraving and Printing. Letter from Chief relative to purchase of supplies for the Bureau of	17	1
Engraving and Printing. Estimate for an appropriation for	159	4
First Auditor's Office. Estimates for additional force in the, if a tax should be imposed on incomes	141	4
Fish hatcheries. Estimates for completing, in Lake County, Colo., and in New York	124	4
Freight on bullion and coin. Director of the Mint presenting deficiency estimate in appropriation for, between mints and assay offices	146	4
Gold coin. Sources from whence supply of, in this country, outside the Treasury, was increased in 1893	26	1
Gold coin. Statement of amount of, received by the Treasury since Nov. 1, 1893, etc	134	4
Gold reserve. Establishment and maintenance of the	47	1
Grassy Island, Detroit River, Michigan. Asking additional appropriation to complete range lights above	142	4
Hay Lake Channel. Suggesting provision for lighting the, St. Marys River, Michigan	79	4
Healy, Capt. M. A. Report of, concerning rescue of crew of the wrecked bark James Allen	143	4
Homes for soldiers and sailors. Secretary of War submitting estimate of deficiencies in the appropriation for	137	4
Immigration. Commissioners of, with dates of appointment and amount of salary	44	1

Subject.	No.	Vol.
Treasury, Secretary of the. Letters—Continued.		
Immigration fund. Receipts and disbursements of the, yearly, since 1889, etc	54	1
Immigration. Report of superintendent of, relative to restrictions applicable to	166	4
Income tax. Amount of revenue derived from the, from 1863 to 1873	10	1
Indian appropriation bill. Secretary of the Interior submitting certain estimates for the	136	4
Indian reservations. Secretary of the Interior urging appropriation for surveying and allotting, for fiscal year 1894	42	1
Indians. Amount paid to Chickasaw tribe of, as interest on trust funds	45	1
Indian Territory. Attorney-General requesting appropriation of $500 for expenses of the judge of the U. S. court in the	131	4
Indian war claims. Report of Third Auditor relative to the, of California	84	4
Italian immigration. Correspondence relative to the padrone system in connection with	114	4
Jacobus, J. W., special deputy marshal. Amounts paid to, for election services in New York City, Nov. 8, 1892	1	1
Marine-Hospital Service. Asking appropriation for additional clerk for office of Supervising Surgeon-General	123	4
Marine-Hospital Service. Requesting appropriation of $35,000 to meet expenses of additional duties, etc	167	4
Marshals, U. S. courts. Attorney-General increasing estimate of deficiency in appropriation for fees and expenses of, for current fiscal year	120	4
Marshals, U. S. courts. Attorney-General requesting additional appropriation for expenses of, for protecting property in the hands of receivers	140	4
Mint. Director of the, urging deficiency appropriation of $46,000 to pay workmen at the, in Philadelphia	78	4
Mint. Director of the, submitting deficiency estimate in appropriation for contingent expenses of the, at Philadelphia	147	4
Navajo Indians. Estimate of appropriation for relief of the, in New Mexico	170	4
New York. Allowances made to the State of, under act of July 27, 1861	25	1
New York Harbor. Estimate for preventing injurious deposits in, for current fiscal year	127	4
Ordnance, Bureau of. List of amounts found due by accounting officers for contingent expenses of the	165	4
Osceola, steamer. Report of Second Comptroller relative to insurance paid on the	133	4
Pacific railroads. Attorney-General submitting estimate of appropriation to enable him to protect the interests of the Government in suits affecting	138	4
Pensioners. Third Auditor relative to claims for expenses of last illness and burial of	89	4
Pension Office building. Estimate of cost of new copper roof for the	150	4
Portland, Oreg. Papers and correspondence relative to claim of	15	1
Postal service. Estimate of appropriation required to complete the, for fiscal year ended June 30, 1894	148	4
Postmaster-General. Letter from the, requesting estimate for rental of part of Union Building	12	1
Property, unoccupied. Recommending the sale of certain pieces of	158	4
Quarantine. Relative to amending the present laws affecting	169	4
Railway cars. Relative to the number of, etc., passing between United States ports, through Canada, since 1885	33	1
Rent of buildings, Interior Department. Estimate of deficiency in the appropriation for	162	4
Revenues. Estimate of, under the new tariff bill, and the effect upon the, of placing sugar on the free list	175	4
Salmon fisheries. Suggesting that last year's unexpended balance for protection of, in Alaska, be embraced in the sundry civil bill	112	4

Subject.	No.	Vol.
Treasury, Secretary of the. Letters—Continued.		
Silver bullion. Aggregate amount of, purchased in October, 1893.	6	1
Silver certificates. Asking opinion of Attorney-General as to lawful character of, as money	48	1
Silver coins. Recommending appropriation of $300,000 for recoinage of uncurrent fractional	171	4
Sugar. List of producers of, and bounty paid to each from July 1, 1891, to Mar. 1, 1894	61	1
Supplies and Accounts, Bureau of. List of amounts found due by accounting officers for contingent expenses of the	165	4
Textile fabrics. Value of, purchased for the Government hospital service during fiscal year 1893	39	1
Traveling expenses. Deficiency of $600 for, of inspector of furniture for public buildings	8	1
Treasury Department. List of appointments, promotions, dismissals, resignations, and reductions in the, from Mar. 4, 1893, to Apr. 19, 1894	107	4
Treasury Department. Statement showing names of persons employed as special agents of the	157	4
Treasury settlements. Second Comptroller relative to certain, certified for payment	98	4
Utah. Amount due United States from, for cost of prosecutions under act of June 23, 1874	28	1
Utah. First Comptroller showing account audited against the Territory of, for years 1875–1886	80	4
Worcester, Mass. Suggesting appropriation of $50,000 for continuing work on the Federal building at	153	4
Treasury settlements. Report of Second Comptroller relative to certain, certified for payment	98	4
Treasury:		
Sources whence supply of gold coin in this country, outside the, was increased in 1893	26	1
Statement of Third Auditor of the, of allowances made to State of New York under act of July 27, 1861	25	1
Trust funds. Amount paid to Chickasaw Indians as interest on their	45	1
Trusts. Attorney-General relative to action taken in U. S. courts to punish persons engaged in, to restrain trade	101	4
Tucker, Irwin. Relative to claim of, late postmaster at Newport News, Va	73	1
U.		
Union Building. Postmaster-General requesting estimate of rental of part of basement of the	12	1
Union Pacific Railway Company. Report of Government directors of the	4	1
United States Armory, Springfield, Mass. Amount expended at the, during year ended June 30, 1893	2	1
Utah:		
Amount due United States from, for cost of prosecutions under act of June 23, 1874	28	1
Annual report of commissioner of schools for	24	1
First Comptroller, showing account audited against the Territory of, for years 1875 to 1886	80	4
Large sums due the United States from, for support of convicts in	18	1
V.		
Venezuela. Correspondence between the Government of, and Secretary of State relative to levying import duties on certain products of	56	1
Veto. Message from the President of the United States returning bill to the Senate with his objections: Bill (S. 1438) for the relief of Louis A. Yorke	173	4
Virginius indemnity fund. Relative to the condition of the	58	1
W.		
Walnut Bend, Ark. Danger of Mississippi River cutting through into the St. Francis River at	104	4
War of 1812. Transfer of military records of the, from Treasury and Interior to War Department	68	1

Subject.	No.	Vol.
War, Secretary of. Letters:		
Aliens. Showing the percentage of, among the officers and enlisted men of the United States Army	176	4
Army. Adjutant-General transmitting reports of officers of the, serving on the frontier in 1855 and 1856	113	4
Everett Harbor. Chief of Engineers relative to	53	1
Everett, Wash. Report of Chief of Engineers relative to cost of dredging the bar at	139	4
Goodwin, Frank. Chief of Ordnance relative to claim of	71	1
Great Falls of the Potomac. Chief of Engineers relative to use of water power of the, for electric lighting in the District of Columbia	154	4
Homes for disabled soldiers and sailors. Submitting estimate of deficiency in appropriation for support of	137	4
Indian River, Florida. Cost of dredging channel from the, to certain point	3	1
Mackinac National Park. Report of Capt. Charles T. Witherell, superintendent of the, for 1893	29	1
Military Academy. O. H. Ernst, superintendent, relative to construction of new reservoir at the	99	4
Military records. Transfer of, of Revolution and War of 1812 to War Department from Treasury and Interior Departments	66	1
Minneapolis, Minn. Chief of Engineers relative to cost of locks and dams to extend navigation to the flour mills at	109	4
Mississippi River. Danger of the, cutting through into the St. Francis River at Walnut Bend, Arkansas	104	4
New York Harbor. Estimate for preventing injurious deposits in, for current fiscal year	127	4
Nicaragua Canal. Report of Capt. George P. Scriven on the military aspects of the	74	1
Sandy Hook. Suggesting appropiation for construction of sea wall at	110	4
U. S. Armory, Springfield, Mass. Amount expended at the, during year ended June 30, 1893	2	1
World's Congress Auxiliary. Proceedings of the, relating to military engineering	119	4
Washington. Report of the Commissioner of Indian Affairs relative to the Indian wars of 1855 and 1856 in the State of	135	4
Wheat:		
Relative to the visible and invisible supply of, in the United States	72	1
Statement of supply of, visible and invisible, likely to be in United States July 1, 1894	125	4
Windom, Mr., former Secretary of the Treasury. Relative to issuing and recording commissions in Treasury Department	50	1
Winnebago Indian Reservation. Commissioner of Indian Affairs relative to reimbursement of settlers on the, in South Dakota	32	1
Wisconsin and Fox rivers overflow cases. List of judgments in, not appealed, etc	90	4
Witherell, Capt. Charles T. Report of as superintendent of Mackinac National Park, for 1893	29	1
Witnesses. U. S. attorney of Washington, relative to deficiency estimate of $400,000 for	55	1
Worcester, Mass. Secretary of the Treasury suggesting appropriation of $50,000 for continuing work on the Federal building at	153	4
World's Congress Auxiliary. Proceedings of the, relative to military engineering	119	6
Y.		
Yorke, Louis A. Message from President vetoing an act for the relief of (S. 1438)	173	4
Yucatan. Claim of W. L. Hardy, John L. Carter, and William T. Holland against Spain for illegal arrest off the coast of	16	1
Yuma Indians. Report from Commissioner of Indian Affairs relative to, and copy of agreement with	68	1

O

53D CONGRESS, 2d Session. } SENATE. { Ex. DOC. 177, Part 13.

FUR SEAL ARBITRATION.

PROCEEDINGS

OF THE

TRIBUNAL OF ARBITRATION,

CONVENED AT PARIS

UNDER THE

TREATY BETWEEN THE UNITED STATES OF AMERICA AND GREAT BRITAIN CONCLUDED AT WASHINGTON FEBRUARY 29, 1892,

FOR THE

DETERMINATION OF QUESTIONS BETWEEN THE TWO GOVERNMENTS CONCERNING THE JURISDICTIONAL RIGHTS OF THE UNITED STATES

IN THE

WATERS OF BERING SEA.

VOLUME XIII.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1895.

FUR-SEAL ARBITRATION.

ORAL ARGUMENT

OF

SIR CHARLES RUSSELL, Q. C. M. P.,

HER BRITANNIC MAJESTY'S ATTORNEY-GENERAL,

ON BEHALF OF GREAT BRITAIN.

The Department of State obtained a copy of the stenographic report of the oral arguments of British counsel before the Fur Seal Tribunal of Arbitration, Paris, 1893, through the courtesy of the British Foreign Office. The papers were handed to Mr. Bayard, Ambassador of the United States at London, with consent to their publication in the American edition of the proceedings of the Tribunal.

DEPARTMENT OF STATE,
Washington, D. C., August, 1895.

ORAL ARGUMENT OF SIR CHARLES RUSSELL.

TWENTIETH DAY, MAY 10TH, 1893.

The PRESIDENT.—Now we will hear the other side, and we are quite ready, Sir Charles Russell, to give you full attention.

Sir CHARLES RUSSELL.—Mr. President and Gentlemen, I do not propose, at this stage of the discussion, to trouble the Tribunal with any comments upon the importance of the fact of this Arbitration,—the fact that two great Powers have come by friendly agreement to submit to arbitration the differences existing between them. Nor do I intend, at this stage, to comment upon the far-reaching importance of the questions involved, nor upon the dignity of this Tribunal, which has taken upon itself the burden of dealing with those questions. I may have, at a later stage, something to say on each of these points; but I desire at once to go straight to the discussion of the subjects with which this Tribunal is charged.

Those subjects naturally divide themselves under four heads. There is, first, that group of questions which we have agreed to call questions of exclusive jurisdiction and right, embraced in the five questions of Article VI of the Treaty of Arbitration. That is the first division. There is, next, the question of Regulations, should the occasion therefor arise, contemplated by Article VII of the Treaty of Arbitration. There is, next, the claim for damages, which, so far as the case of the Government of the Queen is concerned, relates to the seizures unwarrantably made, as that Government contends, and which is dealt with by Article VIII of the Treaty of Arbitration. And, lastly, there is the claim for damages under the 5th Article of the *Modus Vivendi* of 1892.

My learned friends in their discussion have dealt in a greater or a less degree with all of these questions. The Tribunal does not require to be again told by me the position which the Counsel for Great Britain have assumed in relation to these questions; nor to be told that, upon the present occasion, I do not intend to discuss at all the question of Regulations. They belong to a different category. They involve different considerations; and, as it seems to us, they cannot with advantage or with clearness be approached until you have first determined the question whether the consideration of Regulations is to be approached in view of the existence of a legal right of an exclusive character upon the part of America, or in view of the fact, for which we contend, that the United States have no exclusive right of any kind in fur-seals, or in relation to the protection of fur-seals, or in an industry founded on fur-seals; that they have in fact no legal right of that nature at
724 all. Therefore it is that we propose to reserve until a later occasion all discussion as to the question of Regulations.

Nor need I stop to remind the Tribunal of the position which has been consistently and persistently maintained by the Government of the Queen in relation to these two sets of questions: rights and regulations. Our position from the first has been, and is now, an absolute and complete denial of any exclusive right of property, jurisdiction, or protection; but, while that is our position, we have from the first expressed our desire to approach the consideration of the question of Regulations in a fair, just, and equitable spirit, to approach it upon the basis that this question of fur-sealing is one in which there is a common interest of mankind, and which is not the exclusive appurtenance of any one Power.

Now, Mr. President, my learned friends, the learned Counsel for the United States, have occupied some twelve days in presenting their views to this Tribunal: not an hour too long in view of the importance of the questions, if it shall be found, upon consideration and examination of their argument, that that time has been devoted to topics relevant and apposite to the questions with which you have to deal. Upon that subject I must have a good deal to say; but I may be permitted for myself, and for my learned colleagues, to join in the congratulations of a complimentary kind expressed by the President upon the arguments of my learned friends. They were learned, they were erudite, they were full of what Mr. Coudert well said in reference to the argument of his learned colleague who preceded him, but which I may with equal propriety also say of the argument of Mr. Coudert himself, they were arguments full of "intellectual allurements". "Allurements" is a good word. I shall have to submit to this Tribunal that a great many of those arguments were remote indeed from any of the legal questions which you have to decide: that they have taken us very far afield: that, in this 19th Century of Christian civilization, after the world has existed I know not how many years, it is astounding that it should be thought necessary to dig, as my learned friend Mr. Carter did, down to the foundations of human society in order to try and discover those upon which the institution of property rest.

Nor can I think that at this stage of the world's existence, when we are discussing, as is admitted, questions of law,—questions of right to be determined according to law,—a Tribunal such as this can derive much assistance from courageous ascents into the mists and clouds of metaphysical and ethical discussion, such as my learned friend has made. The world has lived very long; society has, through all the ages, been struggling to evolve rules for itself, for its security, for its good order, for peace among men: rules which have been found to suit the convenience of society, which have been found to be conducive to the good order of society, and which have found authoritative expression in the tribunals of all civilized countries.

We cannot but think (we are of course taking the advocate's view of the question) that, in truth, my learned friends have been but
725 making a gallant defence of positions which, in point of law, are utterly indefensible.

Now I may assume, I think, that this Tribunal has made itself conversant with a large part, at least, of that mass of literature with which each side has burdened the Tribunal; and I think, if I am well founded in that belief, that the Arbitrators cannot fail to have marked the change of front in some very important points which has taken place on the part of those who are representing the interests of the United States. This change of front appears when you contrast their arguments to day with the position taken up in the diplomatic correspondence which

preceded this Arbitration, and in the proceedings which were instituted at the instance of the Government of the United States in its own municipal Courts.

I will only, in passing, indicate generally some of those leading changes. I do not refer to them merely for the sake of pointing out a certain inconsistency of conduct. It will be found that there is a real reason underlying that inconsistency, which I shall seek to develop and to bring to the notice of this Tribunal in the course of the discussion of the case. For the moment, I content myself with a general indication of some of the more remarkable changes of front.

Changes of front in United States position.

The first is this. Although the first four questions of Article VI deal with the assertion of a claim derived from Russia,—a claim of exclusive jurisdiction and exclusive rights which it is asserted Russia exercised, and which it is further asserted passed unimpaired to the United States,—we are now told that this derivative title under Russia is a matter of practically no moment. Why? Because we are told that what Russia did needs not to be justified upon the basis of an exclusive jurisdiction, but amounted simply to such executive protective acts as any Power, apart altogether from exclusive jurisdiction, may rightfully exercise in defence of its property and interests. I shall, of course, have something to say about that in a moment: I will merely in passing call attention to the fact that it is impossible to explain the frame of those four questions consistently with any such idea of a mere inherent right of protection of property or of interest: and for this simple reason, that each of those questions is a question of exclusive jurisdiction in a defined area—namely in Behring Sea; and that if the acts of Russia had been acts of defence of property—a right which is inseparable from the possession of property—then that right would not be confined to a defined area, namely the eastern part of Behring Sea, but would be a right which would exist and follow the property wherever the property itself existed. That is the first change of front, a remarkable and significant change,—all the more remarkable when the Tribunal bears in mind the Statutes of the United States, which I shall have to examine presently; the mode in which the aid of those Statutes was invoked by the agents and representatives of the Executive of the United
726 States; and lastly, the judgments of the Courts upon those municipal Statútes, by virtue of which judgments, and by virtue of which judgments alone, they have secured the confiscation of and so affected the property in the vessels of British subjects.

The next change of front is not less remarkable. The third of those Questions in Article VI, the Arbitrators will remember, is the question, "Was the body of water, now known as Behring Sea, included in the phrase 'Pacific Ocean' as used in the Treaty of 1825?" The importance of the question cannot be exaggerated; because, if it were true that, under the operation of the Treaty of 1825, Russia, the predecessor in title of the United States in the Alaskan territory, had recognised the general right of fishing in the North Pacific Ocean including the Behring Sea, of course it would go a long way to negative the existence of any right to limit the right of fishing to citizens of the United States or to those authorised by the Executive of the United States. But to-day we are told by my friend Mr. Carter, in his elaborate argument, that this also is a comparatively unimportant question. The question whether, by those Treaties of 1824 and 1825, Russia recognised the right of all the world to fish in Behring Sea has become comparatively unimportant! although the responsible Minister of the United States,

after this matter had been under discussion diplomatically from August of 1886 till the end of 1890—I am referring, as of course the Tribunal will recollect, to the despatch of the late Mr. Blaine,—declared in his despatch of the 17th of December, 1890, that if Great Britain could satisfactorily establish that Behring Sea was included, in the Treaty of 1825, in the term "Pacific Ocean," the United States had no well-founded cause of complaint against Great Britain.

It is odd that it should be so, but it is left to me, to some extent at least, to vindicate the intelligence and the perspicacity of that distinguished American statesman. He was putting forward a case, not a very hopeful one, certainly, but still a case infinitely more hopeful—if he could have established historically the acquiescence of Great Britain—infinitely more hopeful than the case which is now put forward of property, and right of protection of property, or of an industry founded upon property.

The last change of front is this. It is not, I will admit, as marked as the other two to which I have adverted. We are now told that although strictly the United States could in point of law insist upon its claim of property to the individual seals wherever they may be found,—whether it be three thousand miles south of the Aleutians, off the southern part of California, or elsewhere—yet the needs of the United States case do not require so high a position as that. Also, that while the property in the herd might be claimed by the United States, still it is not necessary to put it even so high as that. And ultimately we have come to this position—a very extraordinary position—that even if it be found, as I hope to make it clear it must be found, that neither in the seal as an individual, nor in the herd as a collection of individ-
727 uals, does any legal property exist in the United States, yet they have a legal right to claim, and a legal right to exercise, a power of protection over an industry founded upon the skinning of the seals upon the Pribilof Islands.

Mr. President, from these observations you will have gathered, although I doubt not you were not unprepared for them, how widely we differ in the views which we take of the legal questions involved in this controversy. But the discussion has been exceedingly interesting; interesting to us as lawyers, mainly because of the courage—I will not say the audacity—with which my learned friends have propounded propositions of law which they affected to suggest were almost beyond question: propositions of law for which I hope to demonstrate there is no legal authority whatever.

General propositions maintained by United States.

Now let me glance at some of these propositions, they are certainly sufficiently startling. I shall have to come to closer quarters with them later, but I am at present endeavouring to present what I may be permitted to call a bird's-eye view of the field traversed by my learned friends. I address myself principally to the argument of my learned friend Mr. Carter, because the argument of Mr. Coudert was, as it seemed to us, in its major part at least, and in its more important part, addressed to the question of Regulations rather than to questions of legal right.

Now what were some of these propositions? One was that the right of protection of the property and interests of a nation are exactly the same in time of peace and in time of war: from which my friend derives the comforting conclusion that ships of a friendly power may be searched, seized, and confiscated because they are pursuing the oldest form of the pursuit of seals known in the history of the world—because they are pursuing pelagic sealing: and that the United States are

entitled to exercise those rights of war in time of peace and against a friendly power, although there has been no diplomatic expostulation or warning.

The next proposition is that the moral law and the law of nature are international law—that the terms are interchangeable; and, therefore, because the United States chooses to come to the conclusion that pelagic sealing is a crime—a grave moral wrong, and an indefensible act—therefore my friends come to the conclusion that it is to be classed with piracy; and that the sanctions which international law applies to piracy may be applied to the pelagic sealer.

Again, it is asserted that even if seals are (it is not admitted that they are) animals *feræ naturæ*, yet the property in them is in the United States, because they breed upon the islands, and have the *animus revertendi* to them.

Now here I must pause to point the two respects in which this last proposition displays, as it seems to us, a remarkable confusion of ideas. It confounds two rights perfectly clear and perfectly distinct.

One is the right in respect of animals *feræ naturæ* which the owner of the soil has, *ratione soli*, to kill those animals when they are
728 on his soil, sometimes called (I think, inaptly called) a qualified right of property: a right, in other words, which, by giving to the owner of the soil the right to exclude all others from access to it, secures to him the exclusive right, while the animals *feræ naturæ* are on the soil, of killing them. That is a distinct, clear, legal conception; a right recognized by the law as incident to property; and it is properly called the right *ratione soli*. But that does not touch or affect the question of property in those animals when they are not on the soil of the owner.

If they be domestic animals, or if they be animals which by the industry, care, and art of man have become assimilated to domestic animals, then a property may exist in them; and the right to possession follows that property even when they are off the land and out of the physical control of the owner. But the right *ratione soli*, which is exclusive of everybody else, and which is exercisable only on the soil of the owner, does not give the property in animals *feræ naturæ* when they are on the land—much less when off the soil of the owner.

Again, a further confusion. *Animus revertendi* is referred to as if the mere fact of *animus revertendi* gave property; and in the argument of my learned friend, greatly to my surprise, he did not attempt to draw any distinction (indeed he said there was none), between the *animus revertendi* which was part, so to speak, of the nature of the animal, and the *animus revertendi* which alone has anything to do with the question of property, namely the *animus revertendi* which is induced by the art, the care, the industry of man. The two things are distinct. If *animus revertendi* gives property in animals *feræ naturæ*, then the law of every civilized country would have given property in pheasants, in rabbits, in hares, in almost every class of animal which is recognized as coming under the head of game; yet it is notorious that the law of every civilized country recognizes that there is merely the exclusive right to take the game when it is upon the land of the owner; and that when the game is off the land, although it has the *animus revertendi*, yet the law does not recognize the right of property on account of that *animus revertendi*, although in that case it is to some extent produced by the art and care of man himself.

The next proposition of my friend is this: Individual ownership ought to exist in all things susceptible of ownership, and ought to be

affirmed to be in that Power which can best turn those things to account for the use of mankind. Therefore, says my learned friend, as the United States are the owners of the Pribilof Islands, and as they can kill the seals upon the Pribilof Islands with more or less discrimination, they are the owners of the fur-seals.

Next: No one is entitled to more than the usufruct of property; therefore, pelagic sealing on the high sea, which may be, or is, wasteful of the stock, is an offence against international law.

And, lastly: although neither the municipal law of the United States, nor the municipal law of Great Britain (and I will add, nor the
729 municipal law of any civilized country) would recognize property in the seals as between individuals—supposing this were a case of private assertion of right, and the Pribilof Islands belonged to a private person,—yet international law can be invoked, says my learned friend, to declare the property in the United States.

Now, Mr. President, I have to say most gravely and seriously that there is no one of the propositions essential to the case of my learned friend which he has propounded with which we can agree. It will be found, as I proceed to examine these propositions, that some of them are propositions in which the right conclusion is drawn from erroneous premises; some of them in which the wrong conclusion is drawn from correct premises; and, to vary the monotony, some in which both premises and conclusion are wrong.

Having mentioned these matters, in which I have expressed, as I am bound to do thus early in the controversy, my disagreement with my learned friends, I am glad to turn to some points as to which I find myself in agreement with them. I agree with Mr. Carter as to the division of the questions submitted to this Tribunal. I agree with him that the first five questions—those in Article VI—are questions of legal right. And I agree with him that, as regards those questions, they are referred to you as judges and jurists. But what does that import? It imports that your duty is not to make the law, but to declare the law: not to speculate what the law ought to be, but to say what the law is: not to formulate or try to formulate novel rights, but to adjudge what are existing rights.

View of United States as to nature of International Law.

Before I proceed to state the order of my argument, I have some other topics to refer to. I think at the very threshold of this enquiry, as my friend has invoked international law and has gone the length of saying that international law gives him warrant for his claim of property in the fur-seals, and as he has put forward the extraordinary proposition that the moral law and the law of nature—what the law of nature in this connexion means I do not know—are two terms interchangeable with international law,—I think it is desirable that I should at the outset, (though I shall have to recur to it) and for the better understanding of my argument, state broadly to you at this stage what our conception of international law is.

It may be admitted that all systems of law prevailing, I care not in what country, profess to be founded upon principles of morality, and upon principles of justice. Does it follow from that that every principle of justice, as one nation or another may view it, or every principle of morality, as one nation or another may view it, forms part of international law? By no means. International law, properly so called, is only so much of the principles of morality and justice as the nations have agreed shall be part of those rules of conduct which shall govern

their relations one with another. So far as they have by agree-
730 ment incorporated into the rules which are to regulate their mutual arrangements, relations and conduct, and so far only, can there be said to be an incorporation of the rules of morality and of justice, as to which nations as well as men differ: so far and so far only can they be said to be incorporated into international law. In other words, international law, as there exists no superior external power to impose it, rests upon the principle of consent. In the words of Grotius, *Placuit ne gentibus?* is there the consent of nations? If there is not this consent of nations, then it is not international law: and I think it is very easy to illustrate that that must be so—that without that consent there cannot be said to be an *imprimatur*, which can give force and efficacy to international law. If it were not so, international law would be in a constant state of flux and uncertainty.

The ideas as to morality of civilised countries do not progress *pari passu*. There are many things which, according to some states of society, justice requires, or morality requires, but which another state of society, which boasts of a proud civilization, declines to recognize. Two instances occur to me; I may refer to them in passing. Take the case of privateering. Privateering, as members of the Tribunal are aware, has again and again been pronounced by writers on international law, and by statesmen, as being the fruitful cover and source of piracy—as a foster-brother to piracy and, therefore, a thing to be put down; and in the memorable Declaration of Paris of 1856, as the Arbitrators will recollect, Prussia, Austria, France, Russia, Sardinia, Turkey and Great Britain, assembled in Congress in Paris, agreed so far as it rested with them, and recorded it in the Treaty there signed, in a condemnation of privateering as against international morals. I think it is true to say that, except the United States of America, in this present day there is no considerable Power in the world that stands out against a condemnation of privateering. Will the United States admit that because all these great Powers concurred that makes international law? No.

The United States, for reasons of its own which I am not at all concerned in discussing now, and which may be right or wrong, was not abreast with the other Nations in that line of thought. Take again another case, the question of the Slave Trade. As far as I know, there is no difference of opinion among any of the Powers which call themselves civilised, as to the immorality of, and the true character to be given to, the traffic in human beings. But Nations have differed as to the means which should be adopted for the purpose of endeavouring to put down that inhuman traffic.

As late as 1848, although the whole voice, I may say broadly, of humanity the world over has condemned the slave trade—and no country has gone farther to make sacrifices in the same direction, to its credit, be it said, than the United States—a Judge of the High Court in Great Britain, in the case of Buron *vs.* Denman, expressly declared that slavery is not an offence against the Law of Nations, and that ownership in slaves is not forbidden by the law of nations.
731 There is a curious comment made upon this proposition at page 7 of the written argument of the United States. After referring to a decision in the same sense in the American Courts, my learned friend Mr. Carter, alluding to Chief Justice Marshall, says—

The Supreme Court of the United States, speaking through its greatest Chief Justice, was obliged to declare in a celebrated case that slavery, though contrary to the law of nature, was not contrary to the law of nations; and an English judge, no less illustrious, was obliged to make a like declaration. Perhaps the same question would in the *present more humane time*, be otherwise determined.

No, sir, it would not. It could not, until nations have given their consent to its being treated as a crime against international law. These distinguished Judges, Chief Justice Marshall, in one case, and Baron Parke in the other, were not the *makers* of international law: they were but the *interpreters* of international law; and a Court such as this, or any Court of Judicature more permanent in its character, could do no more than they did, because there is not the necessary consensus of nations stamping with its *imprimatur* the traffic in slaves as an offence and crime against international law.

Now, this brings out, as it seems to me, in very clear relief the qualifications that are absolutely necessary to be introduced into this much too wide and, therefore, unsound general proposition of my learned friend; and I would like at this stage to show a little more amply, in opposition to it, what our case is on this point. The questions here to be decided must, at each stage of the discussion, be brought into juxtaposition with a clear, definite conception of what the law of nations is. I refer the Court to the Judgment of the Lord Chief Justice of England, Chief Justice Coleridge, in a comparatively recent case, known by the name of the "Franconia case".

(It is reported in the 2nd Vol. of the Exchequer Division of the English Law Reports, under the name of *the Queen* v. *Keyn*. I have the report within reach, and it is at the disposition of any Member of the Tribunal who may desire to read it.) He there says, as was in fact said with certain variations of language by all, or nearly all, the thirteen judges who took part in that judgment, that international law is nothing more nor less than the collection of usages which the civilized states have agreed to observe in their relations with one another. The law of nations incorporates many principles of ethics and of natural law; but only such as it is agreed shall be incorporated form part of that law. The phrase of Grotius, *placuit ne gentibus*, sums up the only possible and the only true idea of the law of nations; and when text-writers and theorists and diplomatists assert that such and such a usage is recognized by the law of nations, that such and such a usage is opposed to the law of nations, that such and such a right exists under the law of nations, in each case the criterion is not whether the rule so expressed, or the usage or the right so asserted, is humane, or is just, or is
732 moral, the sole question is whether it has received the assent and consent of civilized nations: *placuitne gentibus?*

Now, side by side with this conception of the law of nations, there is going on in the world a gradual change and a gradual growth of opinion. Nations are changing their customs, acted upon by external circumstances of their time, influenced by writers and thinkers, who in their turn are influenced by the circumstances of their time; and so there is a gradual formation of a body of opinion which helps to form in the future, aids and stimulates in the future, the recognition by this or by that extension of some principle which may afterwards be brought within the area of international law. There may be opinions, or doctrines, or usages, which perhaps are making their way in the world, are perhaps appealing more or less successfully to the sympathy of thinkers in the world, which are not yet part of the Law of Nations, because nations have not consented to them. They are not the Law of Nations, but only the material out of which, it maybe, at some future time some new principle of the Law of Nations may be developed as the world thinks wise; and I point to this for the reason that my learned friend in the citations from international writers that he has made, and in a much larger number which are given but to which he did not refer, did not

draw that distinction which must be drawn between those writers and authorities, (I think erroneously called authorities), who deal with the subject with a view to discover the metaphysical grounds, the ethical reasons which may be advanced in support of this or that view, and those writers (much less interesting but much safer guides) who confine themselves to laying down what rules have in fact obtained the consent of nations. Therefore, it is important to call attention to the fact that because various writers are constantly propounding ideas of their own, suggesting these ideas as conformable to laws of natural reason and right justice, because they are convinced that their views on those subjects are right,—yet they are not to be accepted as authoritative exponents of what the law is, because neither doctrines derived from what is called the law of nature, nor philanthropic ideas as to what is just or humane, nor the opinions of text-writers however eminent, nor the usages of individual States even if submitted to and followed by other individual States, nor precedents, nor single instances,—none of these, nor all combined, constitute International Law at all; although, as I have said, they may help to stimulate the growth of public opinion among civilised communities, the outcome of which at some future stage, by means of some future development, may be the incorporation of these views, wholly or partially, into International Law.

Now, Mr. President, I thought it well at an early stage, as I must recur to this later, to state in this general way the propositions which have to be discussed. But there is one other matter as to which I am glad to say I also find myself in complete agreement with my learned friend Mr. Carter.

733 The PRESIDENT.—First may I beg to put a question? You speak of International Law as comprising the customs and usages of nations, on which different nations have agreed.

I suppose you mean not only by written agreement, but also by right of usage?

Sir CHARLES RUSSELL.—Certainly. When I say "to which they have agreed", of course, I mean not merely or necessarily by a formal or express or written agreement, but by any mode in which agreement may be manifested, by which the Tribunal may arrive at the conclusion that they have so agreed.

Senator MORGAN.—Including acquiescence?

Sir CHARLES RUSSELL.—Certainly. I use "agreed" in that broad and general sense.

Lord HANNEN.—As a question of evidence.

Sir CHARLES RUSSELL.—As a question of evidence: the question always is, *placuitne gentibus?* You may prove that it has pleased the nations so to agree by any method by which that can be actually established; by express agreement, or by usage, usage long and generally concurred in, and so forth.

I was saying there is one other point on which I find myself in agreement with my learned friend, and that is that the mode in which this question is to be determined by this Tribunal is infinitely more important than the question itself; infinitely better were it for the world that the seals should be exterminated, and that the articles of luxury which are derived from them should perish from the face of the earth—infinitely preferable were it that that should happen than that this Tribunal should deflect a hair's breadth, in the decision of the questions, from the true line of law. Now the importance of this question has been so often referred to by my learned friend, in language of great exaggeration, that I must beg permission for a few moments to reduce

Importance of subject to mankind over-rated by United States.

it to something like what we conceive to be its just and true proportions. My learned friends have spoken of this fur-seal industry, and of the supply of fur-seal skins for the benefit of mankind, as if, were that supply to cease, civilization would receive a rude shock. I have only to say that fur-seal skins are not necessary to civilization, or to the happiness of mankind in this world or the next; that so far as the European uses of seal-skins are concerned, I believe I am right in saying that it is a luxury or a benefit that mankind, at all events in this part of the world, has only enjoyed for less than 40 years. I think I am right in saying that it was a distinguished naturalist, Mr. Frank Buckland, who about the year 1856 discovered a method by which the longer and coarser protective hairs, which formed part of the pelage of the fur-seal, could be removed without injury, so as to disclose the closer and softer and more luxurious fur which forms the rest of the pelage—that it was only then that it came into use to any considerable extent in Europe at all.

Civilization went on before the advent of the fur-seal: civilisa-
734 tion will go on if it should turn out, and we should be sorry if it so happened if it could be avoided, that the seal species should cease to exist.

I want to point out that although my learned friends have been entering into elaborate calculations as to the cost of Alaska to them, and as to the value of Alaska to them being dependent on its fur-seal fisheries, when Mr. Sumner, a well known, and I need not say distinguished United States Statesman of that day, was recommending and justifying to the legislative body in the United States the purchase of Alaska, the references to the fur-seal were of the very faintest description.

Seal fisheries not an important factor in purchase of Alaska.

He points to the fact (it is to be found in the first volume of the Appendix of the British Case, at page 79) that various animals were to be found in the Alaska region. He refers to the sea-otters, river beavers, land otters, black foxes, black-bellied foxes, red foxes, polar foxes, lynxes, wolverines, sables, swamp-otters, wolves, bears, musk-rats, seals—those are hair seals, as you will see in a moment—and so on. And lower down he refers to fur-seals, land-otters, sea-otters, walrus teeth and so on, and descants with great ability and clearness upon these various matters, but saying comparatively little about the fur-seal.

He then refers, on page 82, to what he considers the real value, namely, the *fisheries* in Behring Sea—the fisheries, that is to say, strictly so called. He says:

> I come now to the Fisheries, the last head of this enquiry and not inferior to any other in importance; perhaps the most important of all. What even are sea otter skins—

Those were, the President will remember at that time, much more valuable than any other skins.

> by the side of that product of the sea incalculable in amount, which contributes to the sustenance of the human family.

In very eloquent language he then descants on the great variety of fish in these regions—the halibut, salmon, cod, and the rest. I should not feel justified in troubling the Tribunal to read this at any length.

Senator MORGAN.—Sir Charles, did Mr. Sumner insist that they could sell, and the United States could buy those fisheries?

Sir CHARLES RUSSELL.—No, I do not think he does. He was a much too reputable statesman for any wild proposition of that kind.

Senator MORGAN.—Then we had access to them without buying them.

Sir CHARLES RUSSELL.—Yes, you did not buy the fisheries, but the Alaska territory and such rights as were incident to it.

Senator MORGAN.—I was enquiring what Mr. Sumner said.

Sir CHARLES RUSSELL.—Well, Mr. Sumner was a statesman, and he nowhere says that you bought the fisheries in the open seas.

Senator MORGAN.—I do not know why he alluded to the subject, unless he attached some value to the purchase of Alaska.

735 Sir CHARLES RUSSELL.—Obviously, but what he was saying was this: Here is a great territory, Alaska, purchased by us, with a great sea-board, opening upon an ocean rich in all those things that the sea contains for the benefit of mankind—fish of various kinds: opening therefore to our increasing population new avenues of industry, new opportunities of enterprise and new fields of commerce.

But it never entered the mind of Mr. Sumner to allege that, in purchasing Alaska, he was purchasing the property in the fish in the sea, or, indeed, in any of these things that I have enumerated; and he will not be found to have said anything of that kind; there was no idea that they were purchasing the exclusive rights of fishing in the open waters of the ocean; and especially there was no idea that they were buying in consideration of the value which the territory derived from the fact that furseals resorted there, as I will now proceed to show very clearly.

In 1876, a Committee of Ways and Means was appointed by the House of Representatives. And a resolution of the House was referred to it directing an investigation into certain matters relating to the lease by the United States Government to the Alaska Commercial Company, and this is the Report of that Committee of Ways and Means: (it is referred to on page 70 of the British Counter-Case).

When the proposition to purchase the Alaska territory from Russia was before Congress, the opposition to it was very much based on the alleged barrenness and worthlessness of the territory to be acquired. It was supposed that though there might be many political reasons for this addition to the American Pacific possessions, there were not commercial or revenue advantages. *The value of those seal islands was not considered at all. Russia had derived but little revenue from them, indeed a sum not sufficient to pay the contingent expenses of maintaining the official authority,*— Under our system, however, we have a very different result.

And, on the same page 70, you will find, Mr. President, an extract from, I think, the most authoritative book on the history of Alaska, I mean, Mr. Bancroft's, in which he refers to a Committee of apparently a similar kind which was appointed in 1868. There he says:

The motives which led the United States Government to purchase them (Russia's American possessions) are thus stated in a report of the Committee on Foreign Affairs, published 18th May, 1868. They were, first——

and this answers, if I may respectfully say so, Senator Morgan's question as to what were the objects of the purchase.—

the laudable desire of citizens of the Pacific coast to share in the prolific fisheries of the oceans, seas, bays and rivers of the Western World, the refusal of Russia to renew the Russia-American Fur Company in 1866; the friendship of Russia for the United States; the necessity of preventing the transfer, by any possible chance, of the north-west coast of America to an unfriendly Power; the creation of new industrial interests on the Pacific necessary to the supremacy of our empire on the sea and land; and finally, to facilitate and secure the advantages of an unlimited American commerce with the friendly Powers of Japan and China.

So much as to the motives.

Mr. Justice HARLAN.—It is not your point that the United
736 States was unaware of the existence of the seals there, but that they did not purchase specially with reference to their value?

Sir CHARLES RUSSELL.—Quite so. I do not suggest they did not know fur-seals were there. I am endeavouring to reduce to what I consider to be its just proportions the character of the question that is involved.

The PRESIDENT.—In what you have just read, there is a phrase about the American Fur-seal Company which shows that the American Fur-seal Company, which was refused a new lease by Russia, had an influence in the transaction of 1866 or 1867; and that shows I think that the American Government were awake to the importance of fur-sealing at the moment. I do not mean to say it was the only motive, of course, because there are a number of different motives which are given; but the mention of that motive shows that the fur-seal question was not immaterial even at that time.

Sir CHARLES RUSSELL.—My point is not at all that the United States did not know of these Islands, or may not have thought that there was some value in the fur-seal industry; it may have been considered to some small and limited extent; but I am citing Mr. Sumner's speech to show that he does not put that in a prominent place. I cite the Report of the United States Committee of Ways and Means to show the same thing; and, lastly, I cite the Report of 1876 in which these words are expressly used:

> The value of those seal islands was not considered at all. Russia had derived but little revenue from them, indeed a sum not sufficient to pay the contingent expenses of maintaining the official authority.

The PRESIDENT.—Yes. I referred to the Committee of 1868.

Sir CHARLES RUSSELL.—I am aware you did, sir; and I was referring to it also, to show that in 1868 they gave as their reasons for the purchase—

> The laudable desire of citizens of the Pacific coast to share in the prolific fisheries of the oceans, seas, bays, and rivers of the western world; the refusal of Russia—

The PRESIDENT.—Yes, that is the phrase; and I point it out to your especial attention as indicating the influence of that company, which was an American company, upon the American Government*,—that they had been made aware of the importance of these fur-seal fisheries.

Sir CHARLES RUSSELL.—I quite follow what you mean sir. I am not going at this moment to be diverted from the line I am pursuing; but it will be afterwards apparent that the company there referred to had much wider interests than in the fur-seal; they had trading interests all along the coast, and were succeeding one of the original Russian companies to a large extent, and from their point of view the fur-seal industry was only a part, though not a very considerable part of their affairs. That is all I meant to convey.

Then, the later Committee (as will be seen on the top of page
737 71 of the British Counter-Case), say: "The value of those seal islands was not considered at all."

The PRESIDENT.—Yes; that comes in much later; the other one was more contemporaneous with the transaction.

Sir CHARLES RUSSELL.—Then, finally, on the same page 71, Mr. Elliott, who is referred to very often by some of the witnesses called on the part of the United States as the sole authority upon the subject

* But see page 741-2.

of fur-seals, says, in the beginning of that paragraph. "Strange ignorance of their value in 1867." This, you see, is a Report made to the Government of the U. S., and recorded in 1881 among the United States Papers.

Considering that this return (that accruing from the fur-seal industry) is the only one made to the Government by Alaska, since its transfer, *and that it was never taken into account, at first, by the most ardent advocates of the purchase of Russian America*, it is in itself highly creditable,

and so on; and then he refers to Mr. Sumner, and thus concludes:

Therefore, when, in summing all this up, he makes no reference whatever to the seal islands, or the fur-seal itself, the extraordinary ignorance at home and abroad relative to the Pribilof Islands can be well appreciated.

He is not accurate in saying that Mr. Sumner makes no reference to the furseal; he does, and I have read the passage in which Mr. Sumner makes reference to it, but as a matter of comparatively not much importance.

Mr. PHELPS.—As you refer to Mr. Sumner, have you any objection to read the paragraph in his speech at the top of page 81?

Sir CHARLES RUSSELL.—It is a very long speech, and it would probably induce me to read some other passages also; but I will do it with pleasure. Do you mean the passage which begins—

The *seal*, amphibious, polygamous, and intelligent as the beaver, has always supplied the largest multitude of furs to the Russian Company?

Mr. PHELPS.—Yes; that is the passage.

Sir CHARLES RUSSELL.—I will read it, if you like, although it is giving an importance to the point which I did not intend to attribute it.

Among the furs most abundant in this commerce are those of the fox in its different species, and under its different names.

And then he deals with that, and says some of its furs are among the most precious; and he describes the various kinds. In the next paragraph he says,

Among the animals whose furs are less regarded are the wolverine—

And then he goes on,

Among inferior furs I may include that very respectable animal, the black bear,

and so on.

Then he talks of the beaver, "amphibious and intelligent",
738 which has a considerable place in commerce, and also a notoriety of its own, and so on. And in the next paragraph,

The marten is, perhaps, the most popular of all the fur-bearing animals that belong to our new possessions.

And then he goes on:

The seal, amphibious, polygamous, and intelligent as the beaver, has always supplied the largest multitude of furs to the Russian Company. The early navigators describe its appearance and numbers. Cook encountered them constantly. Excellent swimmers, ready divers, they seek rocks and recesses for repose, where, though watchful and never sleeping long without moving, they become the prey of the hunter. Early in the century there was a wasteful destruction of them. Young and old, male and female, were indiscriminately knocked on the head for the sake of their skins. Sir George Simpson, who saw this improvidence with an experienced eye, says that it was hurtful in two ways: first, the race was almost exterminated; and secondly, the market was glutted sometimes with as many as 200,000 a year, so that prices did not pay the expense of carriage. The Russians were led to adopt the plan of the Hudson Bay Company, killing only a limited number of males who had attained their full growth, which can be done easily, from the known and systematic habits of the animal. Under this economy seals have multiplied again, vastly increasing the supply.

I may supplement this on my own account with another passage.

I mention the sea-otter last; but in beauty and value it is the first. In these respects it far surpasses the river or land otter, which, though beautiful and valuable, must yield the palm. It has also more the manners of the seal, with its fondness for sea-washed rocks, and with a maternal affection almost human. The sea-otter seems to belong exclusively to the North Pacific. Its haunts once extended as far as the Bay of San Francisco, etc.

The PRESIDENT.—May I be allowed to remark that the fur-seal which is actually in fashion seems to be used as a successor to the sea-otter. You are aware that in the French language, by the custom of French furriers, a seal skin is called *peau de loutre*, which means otter skin and not seal-skin. No lady would think of asking for *peau de phoque.*

Sir CHARLES RUSSELL.—The sea-otter has practically disappeared.

The PRESIDENT.—Yes; it has practically disappeared.

Sir CHARLES RUSSELL.—It has disappeared like the buffalo and other animals.

Mr. COUDERT.—Like the southern seal.

Senator MORGAN.—You made some reference to the statesmanship of Mr. Sumner as being superior to the conception, as I understood you, that there could be any purchase and sale of fisheries in the open sea. That opinion has not always prevailed among the statesmen of the United States, I will say, for the reason particularly that in our Treaty of Peace with Great Britain in 1783 we found it necessary to incorporate in the treaty the following:

It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank and all the other banks of Newfoundland, the Gulf of St. Lawrence, and all other places in the sea where the inhabitants of both countries are accustomed to fish.

739 Of course if we had the open natural right of all mankind to fish in the sea that provision was entirely unnecessary in that Treaty. It was insisted on and put in.

The PRESIDENT.—I believe, Senator Morgan, it was an allusion to previous Treaties with France.

Sir CHARLES RUSSELL.—I am much obliged to you, sir. That question of the disputed fishing rights between the United States and Canada on the Eastern coast of America is an illustration or an analogy—I do not know which to call it—relied upon by my learned friends to which I will come in the proper order of argument; but may I, as it has been introduced in this connection, point out that what I did say in reference to Mr. Sumner and Mr. Sumner's statesmanship was, that the extravagant idea never entered into his head that by acquiring Alaskan territory he was acquiring fishes or other free swimming animals in the sea. That is what I think I conveyed, or at all events what I intended to convey; but if I may be permitted to anticipate, the President has rightly, in a sentence, indicated the nature of the question dealt with in the Treaty referred to by Senator Morgan. The state of the case is shortly this: That, in conflict with France, Great Britain, then owning the colonies of America, claimed to have acquired, partly by concession, partly by Treaty: partly by assertion of a right, acquiesced in, though to some extent disputed, certain exclusive rights of fishery.

Senator MORGAN.—But they were a hundred miles away from the coast.

Sir CHARLES RUSSELL.—I do not care where they were, with great deference; it is entirely immaterial to the point I am upon. Then came the American rebellion, and the independence of America. It thereupon

became a sovereign Power, and it claimed that as it had borne its part when a colony in acquiring these rights and in exercising these rights, it was entitled, as an independent Power, to a continuance of those rights which as a colony it had previously enjoyed. The contention on the part of Great Britain was that it had lost its right by what it was pleased to call its act of rebellion, and that it had no right to share in those rights at all; and that matter was ultimately arranged by Treaties, only one of which you have referred to, but which I will have to discuss at a later stage.

Senator MORGAN.—The question in my mind was this, Sir Charles: whether or not Great Britain and the United States had not in this Treaty of peace established the proposition that there was such a thing as ownership in the fisheries that were 50 to 100 miles away from the land, which became the subject of division of property between the mother government and the colony when the independence of the colony was accomplished?

Sir CHARLES RUSSELL.—Absolutely no assertion of property in fishes or in any other animals whatever. There was, I agree, an assertion of rights of exclusive property undoubtedly, which is a very different matter. I do not need to tell the Tribunal that nations have
740 many times—and no two countries perhaps more prominently than Spain and Great Britain—claimed exclusive control of large stretches of the sea; but they have never, so far as I know, claimed the property in free swimming animals in that area, or that they were the property of either Government, or of any individual subjects of that Government.

However, that is going rather far afield. But I am upon a question which I desire to try to follow with some closeness of reasoning. I am now dealing with the exaggerated importance given to this question; and I assume, as the President said, that this question of the fur-seals may have been one amongst many others considered in the United States, but as far as I see not pre-eminently in the minds of the United States advisers, upon the acquisition of Alaska. Their main motives undoubtedly were the motives which were set out in that Report of 1868, that it was opening a large field for new enterprise, an extent of commerce and new pursuits to a rapidly extending and growing population. But what followed the acquisition, what immediately followed and what my learned friends have themselves dwelt on as immediately following the acquisition of Alaska, shows how little conscious they were of the value, as they now conceive it to be, of these islands. What happened? In the year following the acquisition, 242,000 seals were killed upon the islands, and that not by the representatives of the United States or by persons authorized by them. In the following year, 1869, 150,000. In the following year, 1870, 87,000: making a total in three years of close upon five hundred thousand.

Mr. FOSTER.—1870 was under the lease.

Sir CHARLES RUSSELL.—1870 was under the lease; perhaps so. These are figures with which I have no doubt Mr. Foster is familiar. They are taken from the published authentic accounts of the United States, the Tenth Census Report, and certain executive documents which are referred to.

Mr. FOSTER.—We have disputed those figures in our case.

Sir CHARLES RUSSELL.—Well, I do not know what you have not disputed; but since it is put in that way, I had better give the reference.

The PRESIDENT.—The general purport is admitted, I believe.

Mr. FOSTER.—I would not have interrupted except that Sir Charles referred to my knowledge of the figures.

The PRESIDENT.—But, General Foster, I believe that the general purport is admitted, that in those two years there was a great destruction of the fur-seals.

Mr. FOSTER.—There was a great destruction in 1868, and a lesser destruction in 1869.

Sir CHARLES RUSSELL.—I have read the figures, 242,000 in 1868; 150,000 in 1869. The figures for the first year are taken from the Tenth Census Report of the United States, page 40. The figures for the second year are taken from Executive Document No. 32, page 37, of the 41st Congress. There need be no comment about these figures.

741 But there is another consideration. Who knows what part in the future, as a matter of relative importance, this seal fishery may have in the economy of the world, even from the point of view of the interest of the United States? We know that the United States have, all along this Alaskan territory, great salmon rivers, with nascent industries, which will only reach their full development when the growing population of the United States overflows to these to a large extent still uninhabited regions.

Who is to say that this fashion of the day, which may change tomorrow, may not entirely disappear: just as the fashion of the beaver disappeared when it was found that the ingenuity of man, by the invention of the silk hat, had supplied an article that was quite preferable to the "beaver"? Who knows that, compared with the permanent interest of the world in the great food supplies so much more largely in recent than in former years derived from the plentiful bounty of nature in the bosom of the seas, this ocean seal industry may not in a very short time indeed sink into a position of insignificance; and signs are not wanting that the citizens of the United States themselves regard it in that light. I should like to refer in this connection to only one manifestation of that opinion. I refer to the Report of the Board of Trade of Port Townsend, a port of Washington Territory, which you know, is immediately south of British Columbia, and abutting upon Puget Sound. I am referring to page 71 of the second part of Volume III of the Appendix to the British Case.

We do not believe that the lease of the "Pribilof Islands and adjacent waters" ever was meant or intended to mean the whole waters of Behring Sea; but that the limit of one marine league from the shore is the recognized limit, outside of which the waters are known to the civilized world as the high seas, where our citizens should be encouraged to pursue their avocations of fishing and hunting. It is shown by the reports of Government officials in the publication of the Tenth Census that the destruction of fish life by seals, sea lions, and other animals whose sole food is fish, is very largely in excess of the amount of fish taken by the whole of the fisheries of the United States; and to protect these ravenous animals is to cause the destruction of enormous quantities of nutritious food, which should be utilized as a means of supporting the lives of the millions of people in these United States.

The Chamber of Commerce consider that the order of the Government by act of Congress closing Behring Sea is an act, not for the benefit of the people to secure them a cheap article of food, but is for the sole benefit of a simple monopoly, to enable them to supply articles of luxury for the fashionable clothing of the rich. We believe this act of Congress to be a species of class legislation for the benefit of the wealthy few, and as such is opposed to the principles of sound policy; and we protest against its further continuance.

These views may be right or wrong.

Mr. PHELPS.—What city is that?

Sir CHARLES RUSSELL.—Port Townsend in Washington Territory.

Mr. PHELPS.—I did not know there was such a place.

The Tribunal here adjourned for a short time.

The PRESIDENT.—Sir Charles, we are ready to hear you now.

Sir CHARLES RUSSELL.—Mr. President, to prevent a possible
742 misconception, I wish to refer to the Report of the Committee of 1868, which has already been mentioned. It refers to the refusal of the Russian Government to renew the lease to the Russian American Company. The possible misconception I wish to guard against is the supposition that because the word "American" is used it was in any sense an American Company. It was not—it was the representative of the original Russian Company.

Mr. Justice HARLAN.—Of the Russian Company under its first name?

Sir CHARLES RUSSELL.—Acting under successive Russian Charters, but not in any sense an American Company or owned by American citizens. I thought it possible the President might have had a different idea in his mind.

The PRESIDENT.—I thought in fact that Americans had got into the company.

Sir CHARLES RUSSELL.—No sir they had not. One other word.—I pay the greatest deference, I need not say, to what any member of the Tribunal calls my attention to, and in reference to the observation of Senator Morgan that the United States supposed that it was buying the fisheries or the fishes in the Behring Sea (as to which I used perhaps forcible language in suggesting it was impossible to suppose a gentleman of Mr. Sumner's knowledge and statesmanship could have entertained any such idea), I would refer Senator Morgan to page 85 of the report of the same speech to which I previously adverted—(it is in volume I of the Appendix to the Case of the British Government)—in which he points out, quite accurately, what are the advantages which the owners of territory enjoy in relation to fisheries. It is in this language:

> As no sea is now *mare clausum*, all these—(that is to say the fisheries to which he is adverting)—may be pursued by a ship under any flag, except directly on the coast and within its territorial limit. And yet it seems as if the possession of this coast as a commercial base must necessarily give to its people peculiar advantages in this pursuit. What is now done under difficulties will be done then with facilities, such at least as neighbourhood supplied to the natives even with their small craft?

That is to say, the natives even with their small craft and with their imperfect appliances, by reason of their residence on the coast, had peculiar advantages in these fisheries, although as a matter of law and of right they were open to all the world. So he says the possession of Alaska will give special advantages to them in that regard.

It is right to point out that he uses this language in reference to fisheries in a more limited sense than the sense in which it has been used here. My learned friends have spoken of the Alaska seal fishery; their Statutes have treated the fur-seal industry as a fur-seal fishery, and so forth. Mr. Sumner was here particularly referring to fishery in a more limited sense; he was referring more particularly and pointedly to fish of various kinds which he mentions, but he also mentions, among others,
whales; and there is no reasoning in that paragraph which would
743 not equally apply to any free swimming animal which you can find in the sea.

Senator MORGAN.—I should be very much surprised to find that Mr. Sumner had been digressing from the doctrine established at the time we obtained our independence, and was traversing the idea that there was progress in international law.

Sir CHARLES RUSSELL.—I am still endeavouring to get the Tribunal to realize something like a just view of the proportions of this case, and to discount the exaggerations which I suggest have been put forward

on the part of the United States. Now I have to call attention to the fact that when I mentioned the possible case of it being found that this industry of fur-sealing, if encouraged and the species largely multiplied, might be found to conflict with more important general interests, I was not drawing upon my imagination, because we have actual experience in the legislation of other countries, that it has been found necessary to offer rewards for the extinction of animals of the same class. I would refer to the illustrations which are given, which the Tribunal will find in Vol. I of the Appendix to the Counter Case of Great Britain, page 177. The Tribunal, of course, will be prepared for the statement from me that we do not shrink from the legitimate consequences of the propositions that we are advancing.

We say, first of all, that even if the result (apart from any question of regulations which I am not now dealing with at all), of the unchecked exercise of what we claim to be our right of pelagic sealing were to be the extinction of the fur seal, that would be no reason for prohibiting the exercise of our right, if the right exist. It may be the foundation of a consideration or argument why the right does not exist; but if the right exists, and if the consequences of its exercise be the extermination of the fur-seal, we do not shrink from those consequences.

Destruction of the seal may be necessary.

But the point I am now upon, as, of course, you will see, is somewhat different. I am pointing out what other countries have found it necessary to do in this regard, and you will find the legislation in relation to the Baltic fisheries, at page 177 of volume I of the Appendix of the British Counter Case. Now I ought to tell the Court that this is legislation relating, not to the fur-seal, but to the hair-seal. It makes no difference in the argument, as the Tribunal will at once see. The hair-seal is an animal pursued for the sake of its skin. Its skin is an article of commerce. It may not be so important—I am not able to judge of it relatively—as the fur-seal, but it is an article of commerce for two reasons: first for the sake of its pelage, and next for the sake of the oil which can be extracted from its body; and notwithstanding an industry largely pursued, this is the legislation:

> The constantly increasing number of seals on our Baltic Coasts has become so serious a danger to our coast fisheries that it appears high time to find ways and means to keep these injurious animals away from our shores.
>
> Ten or fifteen years ago, when our fishermen still underrated their destruc-
> 744 tiveness, and at best were amused to see one of them, it was hardly thought possible that these animals would one day endanger the fisheries on the coast of Sleswick Holstein, where they formerly appeared only in small numbers, and at places where there was not much chance of their injuring the fisheries.
>
> . . . . . .
>
> It is not easy to answer the question as to how the evil can best be remedied, for even the use of poisoned fish as bait (apart from the danger connected with this method) would not be of any use, because the seals are very choice in the selection of their food, and would only take to the dead bait if there was absolutely no chance to get fresh fish, a case which will hardly ever occur in the open sea. It might be recommended to make an experiment with bow-nets made of galvanized iron wire, painted brown, like the color of the bow nets usually employed. The shape of these bow-nets should be that of the common bow-nets used for catching cod, but the entrances to the different chambers should be so arranged as to make it easy for the seals to slip in.

And thereupon there is a suggestion by Mr. Hinckelmann as to what ought to be done.

Mr. Justice HARLAN.—Before you leave that, Sir Charles, I should like to ask, do you know whether that report was supplemented by legislation?

Sir CHARLES RUSSELL.—That I do not know. We find that there is legislation in the case of Denmark. I am not sure about the other case, but I will enquire as to that.

Senator MORGAN.—Is any of that legislation in force now?

Sir CHARLES RUSSELL.—I have just said that I am not sure whether it was followed by legislation.

Then as regards Iceland this is the note:

The attention of the Legislative Assembly was not specially directed to this matter of protecting the fisheries, nor were laws enacted on this subject before 1885; and the present laws are in many instances primitive, imperfect, and inconvenient, according to the conditions of the country. One of the worst features is that in regard to seals, which are so injurious to the salmon fisheries. This is contained in section 4 of the following statute. The defective point about this bit of legislation is that in all salmon rivers (with one exception) and their mouths, where there are seals there are also seal-catching places, so that the law is of little or no benefit to the salmon, as it is forbidden to disturb the seals in the places where they are at all easily accessible.

Section 4 referred to is as follows:

Section 4: In rivers and their mouths where there are salmon, it is allowed to shoot or frighten seals, with the restriction that the inviolability of breeding and seal-catching places, which are thus especially proclaimed, must not be infringed upon, except with the penalty of full damages, according to the estimate of good men nominated by the judge and sworn in court.

Then as to Denmark there is this:

Owing to rewards now granted by the Fishing Society of Denmark, amounting to 3 kroners for each seal killed, according to the Copenhagen correspondent of our contemporary, "Industries" the extermination of seals is now being energetically pursued in Danish waters. It appears that in those localities where the fishery industry has been pursued with least success the seals most abound. A seal is seldom seen in the neighborhood of Middlefart, in the Little Belt, as the fishermen in that neighborhood are very active in fishing and seal hunting.

Au contraire, on the small island of Hosselo, north of Zealand, one man sent in the heads of no less than 120 seals, while another man sent in 40 within the last ten months. During this period 810 seals have been killed.

745 And, finally, there is a citation on the same page, taken from a United States paper of February of 1892.

The bay fishing in Essex County, Massachusetts, has been so seriously injured by the alleged depredations of seals that the authorities offered a bounty of 1 dollar each for killing them. During 1891 the fishermen killed forty-four on the coast, and in the rivers of the county.

I do not find there was any difference made between males and females; or that the laws of Nature, so strictly insisted upon by my friend Mr. Carter, were regarded as standing in the way of what was a necessary attempt to protect a very valuable industry. I leave this subject with only one concluding suggestion. All the members of the Tribunal may not be aware—many of them I know are aware—that along the coast of Washington in United States territory, and along the coast of British Columbia, (and I think growing industries of the same kind are springing up farther north), are to be found great salmon fisheries, and great canning industries carried on in connection with these industries. I have myself seen them on the Willamette River: they are on the Columbia River: they are on the Iradis River—they are on several other rivers along that coast. Now can it be doubted—is it possible even to suggest it?—that if it were found that those seals were, in a serious degree, interfering with these canning industries, either upon the British Columbian Coast or upon the Alaskan Coast, that it would not be perfectly within the right of those who were interested, by all legitimate means, by all means in their power, short of means which would do injury to the rights of some one else or cause unnecessary or malicious injury to any one else, to do what they pleased to exterminate these animals which were preying upon and injuring what *they regarded as an important* and valuable industry?

Senator MORGAN.—Do you recollect whether Canada passed any Statutes offering a reward for killing seals, or whether they are in operation?

Sir CHARLES RUSSELL.—I will enquire; I am not aware of any. I rather think there are some Regulations in that sense—(whether they amount to Statutes or not, I will not say)—relating to the fisheries on the east coast; but I will enquire and endeavour to supply the necessary answer.

Now I pass from that topic, in the consideration of which I have endeavoured to get the mind of this Tribunal in a fitting frame to consider according to its intrinsic merits and just proportion what this question of pelagic sealing really is. There are some other preliminary matters which I must also refer to. The Case, the Counter Case, the Argument, printed and oral, of the learned counsel of the United States have been full of denunciations of pelagic sealing. It has not only been denounced as inhuman, but each act of the pelagic sealer has been denounced as a crime and a great moral wrong—a little worse than murder, and almost as bad as piracy. Now I wish to examine this for a moment or two, and see whether there is not pervading this style of argument the same kind of exaggeration which was addressed to the subject of the industry itself.

Exaggerated view of pelagic sealing taken by United States.

746

We start with this initial fact, that the pursuit of the fur-seal by means of pelagic sealing is the oldest pursuit of the fur-seal historically known. We start with that fact. It is a pursuit which goes back (to use my friend, Mr. Carter's expression) to prehistoric times. It is a pursuit followed by the aboriginal inhabitants along the coasts in question. But there is also something more to be said for it. My friend Mr. Coudert was sympathetic, as he always is, in his denunciation of the evil caused by the destructive agencies of man as regards seal rookeries in other parts of the world. How stand the facts? Is pelagic sealing, whatever its faults, accountable for that? No. In every one of the cases which have been referred to, the cause of the extermination of the fur-seal species was the indiscriminate slaughter *upon land.* I am not suggesting for a moment that there is not a difference between the system pursued by the United States and their lessees on the Islands and that pursued in the indiscriminate slaughter on the other rookeries in the world. But the fact remains that it has been slaughter *upon land*, and in no case slaughter *at sea*, that has brought about the extermination of the seal species in any of its accustomed rookeries.

Further: it is true to say that discrimination cannot be pursued in relation to pelagic sealing—at least *practically* cannot be pursued. I presume it would be possible to distinguish a full-grown male seal from a young seal, but I take it to be common ground between us that, taking the sizes of seals two and three years of age, it would not be practically possible to distinguish between a female and a male in the water. That is an advantage, *pro tanto*, in favor of land killing. But are there no disadvantages in land killing?

I have been unable to repress a smile when reading the beautifully descriptive, but most imaginative accounts, which are given in the literature of the United States, as to the merits and blessings of killing on land. In one passage the writer has gone to the length of suggesting that the seal herd, grateful for the protection of the United States, reposing with confidence in the humanity of man, had entered into a treaty with the United States—the word "pact" I think was used—that they would offer up a certain proportion of their skins yearly as a

grateful tribute, in recognition of the protection that they derive from the beneficent rule of the Agents and Lessees of the United States.

Now, from these imaginative pictures highly creditable to the human sympathies, and to the imaginations also of those who composed them, I would like to turn in prosaic fashion to the actual facts. What are the actual facts? I am not now dealing at all, the Tribunal will understand, with any considerations which go to build up, in the estimation of the United States, their claim to property. I am simply considering whether there are not certain matters which ought to be borne in mind by this Tribunal in order that it may be able to consider
747 this question of pelagic sealing without having its reason distorted by passion or prejudice: whether there are not other facts which ought to be presented to it, in order to mitigate the tale of supposed horrors attendant upon the practice of pelagic sealing: horrors from which as they contend (but contend untruly as we submit) killing on land is free. Now for this purpose I may refer the Tribunal at once to chapter 14 of the Counter-Case of the British Government. It begins on page 260. Its subject is: "Management of the Pribilof Islands by Russia and the United States". On page 261 there is a general statement, which I will not trouble to read, of the method of driving which is there practised, as the most injurious feature of the system practised on the Pribilof Islands, and it then proceeds to point out—citing authorities upon the subject—its unnatural and destructive character.

True nature of management and killing on the Islands.

But I turn from those general arguments and general statements to page 262, where citations, very *a propos*, are taken from the reports of Mr. Elliott beginning as far back as 1872, that is to say five years after the acquisition of Alaskan territory from Russia. He says:

> A drove of seals on hard or firm grassy ground, in cool and moist weather, may be driven with safety at the rate of half-a-mile an hour; they can be urged along with the expenditure of a great many lives, however, at the speed of 1 mile or 1 1/4 miles per hour; but this is seldom done.

Further on he speaks of the disposition of the old seals to fight rather than endure the panting torture of travel.
and on the next page he writes:

> The progression of the whole caravan is a succession of starts, spasmodic and irregular, made every few minutes, the seals pausing to catch their breath, and make, as it were, a plaintive survey and mute protest. Every now and then a seal will get weak in the lumbar region, then drag its posteriors along for a short distance, finally drop breathless and exhausted, quivering and panting, not to revive for hours—days, perhaps—and often never. During the driest driving days, when the temperature does not combine with wet fog to keep the path moist and cool, quite a large number of the weakest animals in the droves will be thus laid out and left on the track.
>
> . . . . . .
>
> This prostration from exertion will always happen no matter how carefully they are driven; and in the longer drives, such as 2 1/2, and 5 miles from Zapadnie on the west, or Polavina on the north, to the village of St. Paul, as much as 3 or 4 per cent. of the whole drive will be thus dropped on the road; hence I feel satisfied, from my observation, and close attention to this feature, that a considerable number of those that are thus rejected from the drove, and are able to rally and return to the water, die subsequently from internal injuries sustained on the trip, superinduced by this over-exertion.

Then a citation is made from Lieutenant Maynard of the United States service. This is in 1874, that is to say eight years after the acquisition of the islands:

> There has been a waste in taking the skins, due partly to the inexperience of the Company's Agent, and partly to accident and the carelessness of the natives. In
> 748 making the drive, particularly if they are long on, and the sun happens to pierce through the fog, some of the seals become exhausted and die at such a

distance from the salt-houses that their skins cannot well be carried to them by hand, and are, therefore, left upon the bodies.

And the ancient Russian chronicler, to whom my friends Mr. Carter and Mr. Coudert more than once referred with approval,—a cleric or bishop, I am not sure which,—Veniaminof, writing with reference to 1842, thus shewing that this is not a new idea, says:

Nearly all the old men think and assert that the seals which are spared every year *i. e.* those which have not been killed for several years are truly of little use for breeding, lying about as if they were outcasts or disenfranchised.

And Captain Scammon, also of the United States service, says:

The loud moanings of the animals when the work of slaughtering is going on beggars description; in fact, they manifest vividly to any observing eye a tenderness of feeling not to be mistaken. Even the simple hearted Aleutians say that "the seal sheds tears".

Those, you will see, are early strictures upon this method of driving. I now proceed to shew that they are methods which are continued, and that they are marked by as great cruelty and aggravation as formerly.

Mr. PHELPS.—As to one of these extracts, it is right to say we claim that is a false translation.

Sir CHARLES RUSSELL.—Which?

Mr. PHELPS.—The translation to which you alluded, of the Russian author.

Sir CHARLES RUSSELL.—Which is the one?

Mr. PHELPS.—Veniaminof.

Sir RICHARD WEBSTER.—We will get the original; we have never heard that before.

Mr. PHELPS.—It is in the Counter-Case. We have exposed it in the Counter-Case.

Sir CHARLES RUSSELL.—I do not recollect that. At present what I am concerned with is this: that this extract, I wish the Tribunal to understand, from Veniaminof is taken, and taken correctly, from the Census Report, which is an official document furnished to the United States. I understand my friend Mr. Phelps to intimate that in the way it appeared in that official document, it is erroneously translated.

Mr. PHELPS.—It is copied from Elliott's translation into the Report. The translation was made by Elliott.

Sir CHARLES RUSSELL.—I was stating it correctly, I think. Therefore what I understand is this: When we rely upon an Official document of the United States, my friend retorts upon us and says: "But the official of the United States has mis-translated some document which is referred to in that Report." Be it so. If it is so ascertained to be, let it be made apparent.

But now I go on to the next page, 264, and there we have his
749 later experience. He says in 1890—this is to be found in his Report furnished to us by the United States:

I can see now, in the light of the record of the work of sixteen consecutive years of sealing, very clearly one or two points which were wholly invisible to my sight in 1872-74. I can now see what that effect of driving overland is upon the physical well-being of a normal fur-seal, and, upon that sight, feel warranted in taking the following ground.

Would you be good enough to allow my learned friend, Sir Richard Webster, to read this page for me in order to give me a moment's pause?

The PRESIDENT.—Certainly.

Sir RICHARD WEBSTER.

The least reflection will declare to an observer that, while a fur-seal moves easier on land and freer than any or all other seals, yet, at the same time, it is an unusual and laborious effort, even when it is voluntary; therefore, when thousands of young male seals are suddenly aroused to their utmost power of land locomotion over rough, sharp rocks, rolling clinker stones, deep loose sand, mossy tussocks, and other equally severe impedimenta, they in their fright exert themselves most violently, crowd in confused sweltering heaps one upon the other, so that many are often smothered to death; and, in this manner of most extraordinary effort to be urged along over stretches of unbroken miles, they are obliged to use muscles and nerves that nature never intended them to use, and which are not fitted for the action.

This prolonged, sudden and unusual effort, unnatural and violent strain, must leave a lasting mark upon the physical condition of every seal thus driven, and then suffered to escape from the clubbed pods on the killing-grounds; they are alternately heated to the point of suffocation, gasping, panting, allowed to cool down at intervals, then abruptly started up on the road for a fresh renewal of this heating as they lunge, shamble and creep along. When they arrive on the killing-grounds, after four or five hours of this distressing effort on their part, they are then suddenly cooled off for the last time prior to the final ordeal of clubbing; then when driven up into the last surround or "pod", if the seals are spared from cause of being unfit to take, too big or too little, bitten, etc., they are permitted to go off from the killing-ground back to the sea, outwardly unhurt, most of them; but I am now satisfied that they sustain in a vast majority of cases internal injuries of greater or less degree, that remain to work physical disability or death thereafter to nearly every seal thus released, and certain destruction of its virility and courage necessary for a station on the rookery, even if it can possibly run the gauntlet of driving throughout every sealing season for five or six consecutive years, driven over and over again as it is during each one of these sealing seasons.

Therefore, it now appears plain to me that those young male fur-seals which may happen to survive this terrible strain of seven years of driving overland are rendered by this act of driving wholly worthless for breeding purposes—they never go to the breeding grounds and take up stations there, being utterly demoralized in spirit and in body.

With this knowledge, then, the full effect of "driving" becomes apparent, and that result of slowly but surely robbing the rookeries of a full and sustained supply of fresh young male blood, demanded by Nature imperatively, for their support up to the standard of full expansion (such as I recorded in 1872-74),—that result began, it now seems clear, to set in from the beginning, twenty years ago, under the present system.

Sir CHARLES RUSSELL.—Now at a later stage and in a different connection I shall have to draw the attention of the Tribunal again to the statement at the bottom of page 264 of the British Counter-
750 Case as to the certain destruction of its virility and courage necessary to the male seal for a station on the rookeries, as one cause which has contributed largely (with others I admit) to the deficiency in numbers.

Then on the same page is the Treasury Agent's (Mr. Goff) Report for 1890. This has nothing to do, you will understand, with the Report of Mr. Elliott. This is the independent Report of the Treasury Agent.

Sir RICHARD WEBSTER.

Now, in opening the season it is customary to secure all the two-year olds and upwards possible before the yearlings begin to fill up the hauling grounds and mix with the killable seals. By so doing it is much easier to do the work, and the yearlings are not tortured by being driven and redriven to the killing grounds.

Heretofore it was seldom that more than 15 per cent of all the seals driven in the latter part of June and the first few days of July were too small to be killed but this season the case was reversed and in many instances 80 to 85 per cent were turned away. The accompanying percentage examples will shew the disposition of this year's drive. The first killing of fur-seals by the lessees was on the 6th of June and the scarcity of killable seals was apparent to all. The season closed on the 20th of July, and the drives in July shew a decided increase in the percentages of small seals turned away and a decrease in the killables over the drives of June, demonstrating conclusively that there were but few killable seals arriving, and that the larger part of those returning to the islands were the pups of last year. The average daily killing for the season was 400, or a daily average of 522 including only the

days worked... We opened the season by a drive from the Reef rookery and turned away 83 1/2 per cent, when we should have turned away about 15 per cent of the seals driven, and we closed the season by turning away 86 per cent., a fact which proves to every impartial mind that we were redriving the yearlings, and considering the number of skins obtained that it was impossible to secure the number allowed by the lease, that we were merely torturing the young seals, injuring the future life and vitality of the breeding rookeries to the detriment of the lessees, natives, and the Government.

Sir CHARLES RUSSELL.—Then Mr. Lavender, who was also an Assistant Treasury Agent of the United States, says in condemnation of these drives:

All the male seals driven should be killed, as it is my opinion that not over one half ever go back upon the rookeries again.

Then we come to an important paper read before the Biological Society of Washington by Mr. William Palmer of the United States National Museum, in which he, writing in 1891, treats the subject on the same lines, and I will ask my learned friend to read that for me. It is proper to say, as indeed this extract shows, that he has enlarged, in the earlier part of this paper, upon the evils which he conceives to be attendant upon pelagic sealing, and then he proceeds to point out that pelagic sealing is not the only cause which has worked to the detriment of the seal.

Sir RICHARD WEBSTER.—This is taken from pages 187 and 188 of the British Commissioners' Report; but it will be found in part in the Counter-Case on page 266.

But pelagic seal fishing is not the only cause of the decrease of seal-life on the Pribilofs.

Probably an equal cause is the unnatural method of driving seals that has been followed on the islands since the first seal was captured.

751 The mere killing of seals as conducted on the islands is as near perfection as it is possible to get it.

They are quickly dispatched, and without pain. One soon recognizes, as in the killing of sheep, that in the quickness and neatness of the method lies its success, all things considered.

But the driving is a totally different matter. I doubt if any one can look upon the painful exertions of this dense crowding mass, and not think that somewhere and somehow there is great room for improvement. It is conducted now as it always has been; no thought or attention is given to it, and, with but one exception, no other method has been suggested, or even thought necessary.

. . . . . .

The fur-seal is utterly unfitted by nature for an extended and rapid safe journey on land. It will progress rapidly for a short distance, but soon stops from sheer exhaustion. Its flippers are used as feet, the belly is raised clear from the ground, and the motion is a jerky but comparatively rapid lope. When exhausted, the animal flops over on its side as soon as it stops moving, being unable to stand up.

. . . . . .

The character of the ground over which the seals are driven is in many places utterly unfit for the purpose; up and down the steep slopes of sand dunes, over cinder hills studded with sharp rocks, some places being so bad that they are avoided by the people themselves; but the seals have been driven over the same ground for many years, and on some of the hills deep paths have been worn by the passing of tens of thousands of seals. No attempts have been made to remove the rocks or to lessen the difficulties of the passage and the seals are still driven pell mell over huge rocks and down steep inclines, where many are crushed and injured by the hurrying mass of those behind. When the drive reaches the killing ground it is rounded up and left in charge of a man or boy to await the killing, which begins at 7 a. m. A pod of perhaps 60 seals are then cut out of the drive and driven to the killers, who with long wooden clubs stun those seals that are of proper size and condition by a blow or two on top of head.

The seals that are not killed are then driven away by tin pans and a great noise, and while in an excited and over-heated condition rush as fast as it is possible for a seal to go into the icy cold waters of Behring Sea.

It will thus be seen that these seals are subjected on an average from 2 o'clock in the morning until 10 to a long drive over very rough ground, then to a dense

herding, where they are continually in motion and crowding each other, thence to an intense excitement on the killing ground, and finally in a condition a little better than madness rushing into icy cold water.

Uncivilized and partly civilized man has no pity for dumb brutes, and as these drives are conducted entirely by the natives, who prefer indolence in the village to the discomforts of a drive in the fog and rain, it follows that the seals are often driven much faster than they should be, and absolutely without thought or care. But this is not all. The seals that are spared soon haul out again near a rookery, and perhaps the very next day are obliged to repeat the process, and again throughout the season, unless in the meantime they have crawled out on a beach to die, or have sunk exhausted to the bottom. The deaths of these seals are directly caused as I shall explain and, as far as I am aware, it is mentioned now for the first time.

Mr. Palmer then states that he believes death to result chiefly from the consumption of the natural store of fat while the animal is too exhausted to go in search of food. He continues:

I remember looking with curiosity for the cause of death in the first seal I found stranded on the beach. Externally there was nothing to indicate it, but the first stroke of the knife revealed instantly what I am confident has been the cause
752 of death of countless thousands of fur-seals. It had been chilled to death; not a trace remained of the fat that had once clothed its body and protected the vital organs within. . . I opened many after this, and always discovered the same, but sometimes an additional cause, a fractured skull perhaps. I have even noted those left behind in a drive, and watched them daily, with the same result in many cases. At first they would revel in the ponds or wander among the sand dunes, but in a few days their motions became distinctly slower, the curvature of the spine became lessened; eventually the poor brutes would drag their hind flippers as they moved, and in a few days were become food for the foxes. In every case the fat had disappeared.

. . . . . .

During the eight years minority of the few male seals that have escaped their enemies it is safe, I think to assume that at least four summers were spent in getting an experience of the drives. Does any one think that they were then capable of filling their proper functions on the rookeries?

. . . . . .

The natives have been provided with whistles, and when a boat finds itself near a rookery (and a pretence for its presence is easily found) good use is made of them, with a consequent confusion among the seals and a probable increase in the next morning's drive.

Sir CHARLES RUSSELL.—Now finally, after speaking of the method pursued on the Commander Islands, he contrasts the state of affairs as observed by him on the Pribilof Islands, in these words:

On the American side, on the contrary, the seals are driven as fast as possible, the only ones being weeded out being those too weak to go further, while of those rounded up on the killing-ground by far the greater number are allowed to escape. Out of a drive of 1,103 counted by me only 120 were killed; the rest were released.

Now, upon that, the comment made by the British Commissioners is not, I submit, an unfair one, they say:

If it were possible to drive only those seals which it is intended to kill, little exception could be taken to the method of driving in the absence of any better method, but the mingling of seals of varied ages upon the hauling-grounds from which the drives are taken, even under the original and more favorable conditions of former years, renders it necessary to drive to the killing place many seals either too young or too old to be killed.

And then finally, at the top of page 269 of the Counter-Case:

Thus, it has occurred that, in late years, considerable and increasing numbers of breeding females have been driven to the killing-grounds with the killables, though when recognized there in the process of selecting for killing, they have been released.

Now I will only make this comment on that evidence to which I have referred: does it not seem to each Member of the Tribunal that the laudation bestowed upon the system on the Islands has been a little too unqualified: that it is difficult to say that their methods are not marked

by inhumanity and cruelty, and that it is difficult also to say that they are not followed by waste, when you have got the statements by independent persons, representatives of and connected with the Executive of the United States, pointing to the loss by thousands of seals
753 which, subjected to this unusual pressure of locomotion on land, for which nature never intended them, are then separated from the herd, and many of them die? They die immediately from the injuries they receive, and many become utterly useless for the purpose of breeding, their courage and virility being unduly affected.

One point remains. It is still to be said for their methods on the Islands that they make the attempt to discriminate and do discriminate between the sexes; but, even as regards that, the facts show, as I shall proceed to demonstrate at this moment, that they have of late years on the Islands themselves been committing that grievous moral crime of killing females.

Now, how is that established? It is established by the evidence referred to yesterday and also at a previous sitting by my friend Mr. Coudert; but he only read (I am not making it a matter of complaint) quite naturally the passages in that evidence which were *ad rem* to the particular points that he was discussing. But I have to call your attention now to some of the other evidence, and I refer for this purpose to the second Volume of the Appendix to the Counter-Case of the British Government. I will begin at page 245. This is the evidence which my learned friends have been praying in aid, quite justifiably, upon another part of the case,—endeavouring to make out a distinction between the Alaskan and the Russian herds, as they have been called. I am not dealing with that point, as, of course the Tribunal understands, I am on the point that, according to the existing methods, there is inhumanity, there is waste, and there is not absolute discrimination as to sexes on the Islands.

I refer, first, to the gentleman who has received, I have no doubt quite justifiably, a high laudation from Mr. Coudert,—I mean, Mr. Stamp; and, if you read paragraph 5 of his affidavit, you will see that he says:

> A noticeable feature about the consignments from the Pribilof Islands has been that, while formerly the consignments were entirely composed of male skins, of late years, from 1883 up to 1890, female skins have appeared among them each year in increasing numbers.

Then, on page 249,—I am only selecting those who are the most considerable witnesses referred to by my learned friend, Mr. Coudert,—in the declaration of Mr. Bevington, paragraph 3, he says:

> As regards the Alaska Catch, I have during the last four or five years noticed amongst them a small quantity,—say from 10 to 15 per cent.—of female skins.

And Mr. Allhusen, on the same page, paragraph 3, says:

> There is another feature in relation to the Alaska skins, namely, that they, for the most part, are entirely composed of male skins. Of late years, that is to say, from the year 1883 or 1884, I have noticed amongst this consignment a certain percentage of female skins, which percentage has increased in later years.

The same thing is to be found in paragraph 9, page 250, of the declaration of Mr. Henry Poland; and there are several more in the same sense, but I will not trouble the Tribunal by referring to them.
754 I say, therefore, that it stands thus: I do not at all concede (I am sure the Arbitrators will understand this) that these considerations—and I will give the reasons when the proper time comes—have anything to do with the question of affirming the right of property, or the right of protection, which of course can be only incidental

to that property. If there is no property, there is no protection, because there is nothing to protect; but I dwell upon this, because, I think it important to do so in order that the Court may see that the claim which the United States Counsel have been instructed to make, or thought fit to make, that the system pursued on the Islands is wholly free from objection on the ground of waste or on the ground of cruelty, is a claim which, when the facts are examined, is seen not to be well-founded. There is certainly this to be said—and my learned friend, Mr. Coudert, made it a subject of humourous observation, but it seems to me a just enough observation,—that the pursuit of the seal at sea does give the animal a chance of escape. The clubbing him on the head makes the islands a mere slaughter-house for the seal and gives him no chance at all. And after all there is this to be said for pelagic sealing, that at sea the seal is in his natural, or what I claim to be his natural element; and he has been furnished by nature with means of resistance to the attempts of man, with means of evading the pursuit of man, which give him a better chance of life and of escape.

Now my learned friends, as the Tribunal cannot fail to have noticed, have adopted a lofty tone in this discussion. I think you, Mr. President, said that Mr. Carter, in his eloquent address, spoke for mankind. He did. *How* he spoke for mankind I shall make apparent in a moment or two. But my learned friend, in effect, said this: "We the United States are not making this claim from any selfish motives. We are here as the friends of humanity. We acknowledge that this is not our property absolutely. We are trustees for the world at large. We are trustees: mankind the *cestuis que trustent.* We only ask to be permitted in the interests of mankind, for the benefit of mankind, to perform our office as trustees, as friends of humanity, as philanthropists, as champions of the interests of the world".

Well, I am very far from doubting the sincerity of my learned friends; but I must be permitted to point out that, while accepting these professions as sincere, their demands seem to me to be exactly the demands which would be made by a selfish Power making an effort to secure the seals for themselves; for what do they say? "We are the owners of the Pribilof Islands in Behring Sea. They are pleased pathetically to describe those Islands as the last home of the fur-seal". They say: "Give to us, the tenants and owners of these Islands, the power to exclude everybody but ourselves from the great expanse of ocean in which those Islands are situate. Put an end to pelagic sealing in the Behring Sea, and not in Behring Sea only, but justify us in stretching out the arm of legal authority over a still wider expanse of ocean.

Authorize us by your award to search, and if necessary to seize
755 and confiscate, vessels that are engaged in this inhuman, this immoral traffic, or vessels that we suspect are engaged in this pursuit; and having given us that authority we will recognize our duty as trustees to mankind by giving to mankind the benefit of the fur-seal at the market price": the market price being enhanced by two considerations: the considerations, first, the duty which the United States imposes upon every fur-seal skin taken on the Islands; and enhanced, next, by the fact of the monopoly which this demand implies and secures.

I will only take leave to say that that does seem to be a very extravagant view of the obligations of a trustee for the benefit of mankind, and that I do not see in what way this profession of the duty and obligation of the trustee differs from the assertion of the most exclusive and absolute right which the most selfish nation might assert in any subject of exclusive property.

I wish to make this position as to the conditions on which they offer this commodity to mankind pretty plain. If they disapprove—and I believe they do disapprove—of pelagic sealing, I am going to give them the benefit of a suggestion which will put an end to pelagic sealing. What is it that has made pelagic sealing worth the efforts and enterprise of the men who have now made it a considerable commerce? It has been the fictitious, enhanced value that has been put upon sealskins by reason of the exaction which the United States make in respect of every skin brought in to their dominions—an exaction from which the territories outside their dominions are free. What is that? For this is a matter that I think is not yet in the apprehension of the Tribunal.

From 1870 to 1889 the United States were paid a yearly rental of $55,000 for the tenure of these islands. In addition to that they imposed a tax of $2.62.5 per skin, which on a hundred thousand skins would amount, spreading the rental over the entire number, and adding, of course, the exaction per skin, to $3.15 per skin, or thirteen shillings in English money. From 1890 the rent was $60,000 yearly rental for a lease from 1890 for twenty years, which would expire, therefore, in 1910.

The tax was raised to $9.62.5 per skin, and the limit was 60,000 skins per year; and in the same way, taking the yearly rental of $60,000, and adding a proportionate part to the $9.62.5 per skin, we find that the exaction in respect of each skin is $10.62, or over 42 shillings, English currency. There is the secret of pelagic sealing. Those who think they have the right to pursue it, United States citizens be it noted amongst the rest, Canadian settlers amongst the rest, subjects of the Queen inhabiting these parts, are tempted to engage in it; and it is that very exaction which supplies the motive and gives the reason for pelagic sealing. I need not say that I am not questioning the right of the United States in its wisdom and judgment to impose any tax it pleases, under any conditions it pleases, upon those who are subject to its rule. That is not the object of my argument. My argu-
756 ment is to show that it is this very exaction which gives to those who are outside the dominion of United States law the freedom from that exaction which supplies the motive without which pelagic sealing would not be an existing thing to-day. I do not doubt the sincerity of my friends. If those who instructed them, if those who actuate the policy of the United States, desire sincerely, as trustees with no selfish purpose, as trustees for the benefit of mankind, to send these blessings abroad, to send them abroad on reasonable terms, and above all, while they are doing that, to put an end to pelagic sealing, the remedy is to be found in the direction which this suggestion of mine indicates.

Senator MORGAN.—Sir Charles, do you know whether the price at which the United States have taxed these skins has had the effect of raising the price of the Russian and Japanese catches?

Sir CHARLES RUSSELL.—I am not able, sir, off hand, to say; but I should say certainly it would have that effect too.

Senator MORGAN.—I have not seen any evidence of that fact in this case.

Sir CHARLES RUSSELL.—I think some of it will be forthcoming a little later.

I am really tempted to exclaim—I mean no offence to my learned friends—when the argument is put forward in this specious way, I am tempted to exclaim with Dr. Johnson, our great lexicographer, "Let us rid our minds of cant". Let us approach this question fairly, look it

straight in the face, let us hear as little as possible in the future in this argument about these high philanthropic aims, this benefit to mankind, and all the rest of it.

Mr. Justice HARLAN.—Will you explain how the exaction of the United States, to which you have referred, increases the price in the London market of seal-skins taken in the North Pacific by pelagic sealers who do not have to pay this exaction?

Sir CHARLES RUSSELL.—Of course it is that very consideration which gives to the pelagic sealer in the North Pacific his margin of profit.

Mr. Justice HARLAN.—I can understand how those who take them on the islands and have to pay those exactions must ask a certain price in London in order that they may get sufficient profits; but if the pelagic sealers are not subject to those exactions, can they not undersell those who carry skins from the Pribilof Islands to the London market?

Sir CHARLES RUSSELL.—My answer is very brief. The price of the article in the ultimate market to which it finds its way, although it may be in some stages influenced by the cost of production, is ultimately and mainly influenced only by the question of supply and demand; and therefore the pelagic sealer, although of course he could afford to sell the skin at a lower price, will not sell it at a lower price than that which the market commands. The difference between the position of the pelagic sealer who is outside the area of United States legislation and the man who is within it, is that the one man has to pay this tax and the other has not. That is the difference.

757 The PRESIDENT.—Would you go so far as to say that pelagic sealing would be utterly impossible if there were not this tax to pay to the United States—that the expense, for instance of pelagic sealing would be too great for the skins caught at sea by pelagic sealing to fetch a marketable price?

Sir CHARLES RUSSELL.—I should not like to commit myself to that statement, sir, without some consideration. I should not like to say that pelagic sealing would entirely cease; but certainly it would not offer the inducements which the existing state of things does offer to pelagic sealing, for the obvious reasons that my learned friends have enlarged upon. They have established—I think satisfactorily established—that if there is no tax, the man who clubs the seal upon the island can bring the skin of that clubbed seal to the market upon cheaper terms and with less expenditure of labour than the man who has to pursue it in the open ocean; but I should not like to go the length of asserting that it would necessarily put an end to it entirely. Certainly it would to a very large extent.

Senator MORGAN.—Sir Charles, it is proper, I think to remark in regard to the policy of the United States Government in taxing the take of the seals there that it is to sustain the Government. This is the only industry upon those islands; and I think that the United States is the only country in the world whose Constitution prohibits its Government from levying an export duty. I think it is the only one.

Sir CHARLES RUSSELL.—I take the liberty of saying, sir, that I did not presume to offer any opinion in the sense of condemnation, or even of adverse criticism upon what the United States choose to do. I was merely dealing with the pretensions put forward that the United States were appearing in this matter simply as champions for the interests of the world, as friends of humanity, and were merely offering as trustees or intermediaries this article of luxury for the benefit and in the interest of mankind, or of *womankind.*

A complaint has been made, Mr. President, which I must notice in passing, by my learned friend Mr. Carter, and referred to also by my friend Mr. Coudert, which took this form: that if Canada had not intervened this arbitration need never have been held—in other words that the United States and the Government of the Queen would have come to terms in the matter. Is it quite right that that theme should be introduced at all? Who have a better right to speak in this matter than those who are directly interested? Who?

United States criticism of Canadian position.

To the United States, with its boundless resources, this is a very small matter; to Canada, comparatively poor, a struggling but a rising colony, it is a matter of considerable importance; and surely, as the voice of Canada cannot be heard diplomatically as between her and the United States, it was not only the right but the duty of those who represented her to put forward their views, and to put forward their views as strongly as they could, as to the nature of the interests
758 involved and the loss that might result to Canadian enterprises and commerce if the course indicated by the United States were acquiesced in. I think America ought to be the last country, its representatives the last people, to seek to limit the rights of expostulation and of action on the part of colonists. They held a very free and very correct view of their rights in that regard while they were still colonists; and in the time of Lord North, the Lord Salisbury of that day, they showed very clearly, very plainly, and, as I believe, most justifiably, that they were the best judges of what their own interests as colonists demanded.

I pass from that. A complaint has also been made about the British Commissioners; and I think it due to those gentlemen, both of whom I have the honour of knowing, to say a word or two about them.

United States criticism of British Commissioners.

I think before their conduct was criticised, before my learned friends with more or less vehemence asked this Tribunal to regard them as partisans, as hostile witnesses from whom they were at liberty to extract any admission which was in their favour, but were at liberty to discard all that was not in their favour—before they pronounced a judgment as to the manner in which those gentlemen had performed their duties, I think it would have been right in common fairness if my learned friends had referred to the mandate under which those Commissioners acted. If they had done so, I think they would have seen that it was impossible for them to keep out of sight in their Report what they conceived to be the evils both of management on the islands and the evils of pelagic sealing, as to which they frankly and openly avowed their opinion. Their authority was derived from two documents which are put as the preface to their Report. The first is the letter of Lord Salisbury, of the 24th June 1891. It is in the preface to the Report, and begins with this statement:

> The Queen having been graciously pleased to appoint you to be her Commissioners for the purpose of inquiring into the conditions of seal life in Behring Sea and other parts of the North Pacific Ocean, I transmit to you herewith Her Majesty's commission, etc.

Let me in passing point out a mistake into which I venture to think my learned friends have fallen when they refer to this in another connection, which I am not now dealing with; but as it is under my eye, and as I probably shall not need to recur to it again I wish to make the correction in passing.

My learned friends claim this mandate, applying not only to Behring Sea but to other parts of the North Pacific Ocean, as supporting their argument that regulations, protection, and jurisdiction outside of Beh-

ring Sea was contemplated in it. I wish to remind the Tribunal, that there is in this a confusion. In the diplomatic correspondence, beginning in the time of Mr. Secretary Bayard and renewed again after a long interval, there are two lines of negotiations running on side by side almost. One of these is the consideration of the questions which have arisen in difference between Great Britain and the United
759 States, and which, as I shall hereafter in another connection demonstrate, relate to Behring Sea and to Behring Sea only. But in addition to that there was a suggestion put forward by Mr. Bayard, and assented to by the British Government, as to an inquiry which should not be confined to Great Britain and the United States, but which should extend to other Powers interested.

The suggestion had its origin in the note, which, you will recollect, sir, was addressed by Mr. Bayard to various Powers asking for their co operation. It was in view of that general inquiry, not restricted to the United States and to Great Britain, that the idea of the commission was originally started; but side by side with that, distinct from that, and, as Mr. Wharton says in one of the letters to which I shall hereafter refer, without prejudice to the questions in dispute between the United States and Great Britain, this question of the larger commission was being considered.

Lord Salisbury then proceeds:

The main object of your inquiry will be to ascertain "what international arrangements, if any, are necessary between Great Britain and the United States and Russia, or any other Power, for the purpose of preserving the fur-seal race in Behring Sea from extermination."

You will recollect, sir, that this idea of the Commission had originated long before the Treaty was signed.

He proceeds.

Application has been made to the United States for permission for you to visit the seal islands under their jurisdiction, and a similar request will be addressed to the Russian Government.

I pause here to ask, what was the object or the use of their having permission to visit the Commander Islands and the Pribilof Islands, unless it was to note what they saw, and, so far as it was relevant, to record, note, criticise, comment on the conditions of seal life?

Your attention should be particularly devoted to ascertaining (1) the actual facts as regards the alleged serious diminution of seal life on the Pribilof Islands, the date at which the diminution began, the rate of its progress, and any previous existence of a similar occurrence; (2) the causes of such diminution, whether and to what extent it is attributable (*a*) to a migration of the seals to other rookeries, (*b*) to the method of killing pursued on the islands themselves, (*c*) to the increase of sealing on the high seas, and the manner in which it is pursued.

Then they are enjoined to neglect no sources of information, and to carry on their inquiry with impartiality.

Then at a later stage—it is the only other extract with which I shall trouble the Court,—at the top of page VII, after they have been abroad, a further letter is directed to them on the 15th of January, 1892, only one passage of which I intend to read.

You will observe that Lord Salisbury says, and this is before the report is drawn out—

that it is intended that the Report of the Joint Commissioners shall embrace
760 recommendations as to all measures that should be adopted for the preservation of seal life. For this purpose it will be necessary to consider what regulations may seem advisable, whether within the jurisdictional limits of the United States and Canada, or outside those limits. The Regulations which the Commissioners may recommend for adoption within the respective jurisdictions of

the two countries will, of course, be matter for the consideration of the respective Governments, while the Regulations affecting waters outside the territorial limits will have to be considered under clause 6 of the Arbitration Agreement.

I say that no candid man—and I think my friends are candid men—could read this without seeing that it was impossible for the Commissioners to have avoided going into the matters which they did go into. The consideration of pelagic sealing involved the question whether it had necessarily incident to it all the evils which were attributed to it; the consideration of the management of the islands involved the questions whether it was the impeccable system which its friends professed it to be, or whether there were not to be found in this management some explanatory contributory cause of the admitted decrease in the numbers of the seal herd.

Mr. CARTER.—I did not object to their going into those things. You do not impute that to me; do you?

Sir CHARLES RUSSELL.—I rather thought my friend's argument—I may have misconceived it—amounted to this: "I, counsel for the United States"—and from that point of view I can quite understand my friend's position—"begin by laying down the proposition that pelagic sealing is a moral crime, that it is an unjustifiable wrong, that it is brutal, something a little worse than murder, and almost as bad as piracy." From that point of view I can quite understand his impatience with a man who has anything to say even in mitigation of pelagic sealing; but from the point of view of the Commissioners, I venture to say that they were perfectly within the lines of their duty, nay, that they would not have fulfilled their duty, provided they did it honestly, if they had not presented their views for consideration. But, as a matter of fact, if you will examine that very lengthy Report of the British Commissioners, it will be found that nine-tenths of it is a record of facts; and perhaps the highest tribute—it ought to be almost enough for me to say this—the highest tribute to their impartiality is to be found in the fact that in the enforcement of their positions on the subject of regulations, and indeed in some respects upon the subject of property, my learned friends have cited much more frequently from the Report of the British Commissioners than they have felt themselves justified in citing from the Report of their own Commissioners.

I am not going to make any attack upon the United States Commissioners. I have no such purpose. They take the standpoint that no killing should be permitted except upon the islands. If the British Commissioners had followed the same line of argument, I suppose that they would, if they had been partisans, have insisted that no killing should take place except at sea; and they certainly would have
761 had this in their favour, as I have previously pointed out, that whatever else may be said of pelagic sealing, it cannot be truly convicted of ever having caused the extermination of the seal in any part of the world where pelagic sealing merely was practised.

But in this connection, and before the Tribunal rises, and in order that I may dismiss this topic, I would point out that both my learned friends take this lofty tone as regards pelagic sealing: yet driven by pressure of argument going on involuntarily in their own minds, aided a little, I will admit, by certain questions addressed to them in the course of argument from the bench, my learned friends have been obliged to pursue a course utterly and completely inconsistent with their profession as to pelagic sealing. Why? Because my learned friend, Mr. Carter, driven, as I say, by stress of argument and by the natural candour of his

Position taken up as to Indians inconsistent with general argument of United States.

own mind, not completely under control, says: "I must admit that Russia when she discovered the Pribilof Islands, acquired the rights in the Pribilof Islands and in the fur-seal industry connected with them, subject to the moral right of the native Indians to pursue pelagic sealing."

Moral right to pursue pelagic sealing! Moral right to commit an indefensible wrong! Moral right to commit a crime against humanity! Moral right to commit an offence a little worse than murder, and almost as bad as piracy! My learned friend had not appreciated the length to which that inconsistency leads him, and the position in which it lands him. His idea seems to have been that there were a few straggling Indians along this coast, existing from a pre-civilized occupation, who used to go out in their canoes, and when impelled by hunger or the urgent need of raiment killed fur-seals. "Quite right", said my learned friend, Mr. Carter, "Yes; kill a fur-seal for the necessities of your stomach and for the necessities of your back; but if you do more than that it is a crime. Kill for your stomach. Kill for your back"—probably he would also extend it to the backs and stomachs of the other members of the family—"but beyond that you must not go. Barter you dare not, you cannot. The destructive agencies of civilization and commerce come in. Once you do that, you are beyond the pale of civilization": and international law, in some incomprehensible way, is down upon him. He is *hostis humani generis.*

I need not say that is an impracticable kind of limitation to seek to imply; but it is not only impracticable to imply it, but as a rule at all applicable to the condition of things on this coast it is wholly foreign to it. What is the fact? My learned friend forgets that the Hudson's Bay Company, which owned a Charter as far back as the time of Prince Rupert, acquired territorial dominion in the way in which sovereigns were accustomed to grant territorial dominion in those days, over all the territory stretching westward from and contiguous to Hudson's Bay; that that company had been carrying on this commerce, and a great commerce in furs of all kinds, fur seals amongst the rest, although
762 to a limited extent, by this very system of barter with these natives along that coast. My learned friend forgets also that under a lease from Russia before the sale of Alaskan territory to the United States, for a number of years the Hudson's Bay Company had a lease of an important part of this very Alaskan territory from Russia, and in the same way along this very coast was securing by barter from the natives all the pelts on that coast, including, to a limited degree I admit, the fur-seal amongst the rest. In other words, it never was the case, so long as there was any approach of civilized man to the neighborhood at all, that there was a limitation of pelagic sealing to meet the mere necessities of the hunter, or the mere need of clothing. They have lived by it. They have bartered the products and the result of their hunting and of their industry, and so far from their being scant of raiment, and so far from their raiment consisting of what I may call barbaric material, I am told that these gentlemen, on their Sundays and holidays, sport tall hats and linen shirts, and vestments made by more civilized people than themselves; and amongst other things they own schooners.

Mr. FOSTER.—In these last days.

Sir CHARLES RUSSELL.—Well, they are progressing in civilization, I agree.

Mr. FOSTER.—And in pelagic sealing.

Sir CHARLES RUSSELL.—I do not see that that helps my learned friend at all. If they have done that, you see how fatal that is to the argument of my friend, Mr. Carter; because we have got beyond the days when the skin was necessary to be girt about the loins. We have got beyond the days when the food of the seal was needed to satisfy the primary wants of the natives.

The PRESIDENT.—Could you tell us, Sir Charles, at what time that lease between Russia and the Hudson's Bay Company was made?

Sir CHARLES RUSSELL.—Certainly, Sir. I shall be able to give you satisfactory information about it. I have not got it at this moment.

The PRESIDENT.—We should be pleased if you would give us that information.

Sir CHARLES RUSSELL.—Certainly, Sir.

The PRESIDENT.—We have decided to sit to-morrow. Although it is Ascension day, the earnestness of our task prevents our making a holiday of it, and we will sit at the usual hour.

The Tribunal accordingly adjourned until Thursday, May 11, 1893, at 11.30 o'clock A. M.

TWENTY-FIRST DAY, MAY 11TH, 1893.

The PRESIDENT.—Sir Charles, if you please, we are ready to hear you.

Sir CHARLES RUSSELL.—Mr. President, I have only an additional word or two to say upon the subject of the attack, made courteously, I admit, upon the British Commissioners. I understand the main point of that attack to be that they, instead of condemning, said something to justify and to recognize the fact of pelagic sealing. I wish now to refer to the passage to which specific attention was called by my friend. It is section 102 of the British Commissioners' Report. I will read it, and also section 103.

In regard to interests, the sealing industry is naturally divided into what may, for the sake of brevity, be termed the shore and ocean interest respectively. The rights in either case are indisputable, and the possessors of one class of these rights will not willingly allow them to be curtailed or done away with for the mere purpose of enhancing the value of the rights of their commercial rivals. Thus the only basis of settlement which is likely to be satisfactory and permanent is that of mutual concession, by means of reciprocal and equivalent curtailments of right, in so far as may be necessary for the preservation of the fur-seal.

It may be added, that the line of division between the shore and ocean interests is not an international one, and that the question of compromise as between the two industries cannot, in consequence, be regarded strictly from an international point of view. If we may judge from the respective numbers of vessels employed, the interest of citizens of the United States in pelagic sealing is at the present time approaching to an equality with that of Canada, while Germany and Japan have been or are represented in sealing at sea, and other flags may at any time appear. The shore rights, again, are at present chiefly divided between the United States and Russia, although Japan owns some smaller resorts of the fur-seal.

The Tribunal will see that the Commissioners are there presenting the consideration of the shore and ocean interests, as they designate them, not merely as a matter in contention between the United States, on the one hand, and the subjects of Great Britain upon the other, but they are speaking of those rights generally. They point out in the next passage that it is not an international difference merely between Great Britain and the United States, because the citizens of the United States themselves take a large and important share in pelagic sealing; and therefore the observations in those paragraphs are not confined to Behring Sea, still less to the eastern portion of Behring Sea, in respect of which the United States asserts special and peculiar claims. It must not be forgotten that, treated in that broad sense, pelagic sealing is a fact which has never been questioned, even by the United States, outside Behring Sea until this controversy has arisen.

Do not let it be forgotten that although the United States, *quâ*
764 foreigners, are restricted in efforts of legislative control absolutely to territory,—that is to say, although the effect of their legislation, as against foreigners, is confined to and does not extend beyond their own territory, an admitted principle I need not say—yet their legislation may apply to the whole world as regards their own nationals. In view of this complaint against the British Commissioners that they recognized pelagic sealing and spoke of the right of pelagic sealing we find therefore

this remarkable state of facts: First, that the United States has never by any legislation pronounced pelagic sealing to be a crime or a wrong if committed by its own nationals outside a given area; and next we have the further extraordinary fact,—all the more extraordinary when it is borne in mind that what the United States claimed the right to do as regards the ships of other nations is claimed by them as a mere protective right,—that they have never even affected to exercise that protective right outside Behring Sea even against their own nationals. The Tribunal is aware that the seizures have been confined to Behring Sea, and that there has been no pretence of even any attempt to restrain, by executive or by legislative action, pelagic sealing outside that area.

Now I have said all that I desire to say in defence of the Commissioners. So far as they are chroniclers of fact their good faith is not questioned by my learned friend: so far as they express opinions and make suggestions, those will be judged by this Tribunal upon examination according to their intrinsic merits. I only pause to point out that they have spoken in general of the right of pelagic sealing, a right I say which has never been questioned till this controversy has arisen. They then in the succeeding paragraphs proceed to consider the case, so far as that question of pelagic sealing comes into controversy as between the United States and Great Britain.

I leave this subject, not venturing to express any opinion of my own, which I conceive not to be quite regular; but humbly submitting to this Tribunal that the more the details of this Report are examined the more it will be found that these Commissioners have approached the subject with perfectly free and open minds, and have only embraced in their consideration topics which, by the terms of the mandate under which they were acting, they could not properly have excluded.

Novelty of claim of United States.

Now I have only one other matter to observe upon before I come to closer grips with the actual questions in this case. I have to draw the attention of the Tribunal to the extraordinary novelty of the claim which is here asserted. This idea, if I am able to convey it to the minds of the Tribunal, must have a very serious effect in arresting the attention and fixing the mind of each member of it upon the legal considerations, and the consequences which will follow if the right is declared to be based on legal considerations. I said yesterday, I repeat it to-day, that at various stages of the world's history, according to their varying powers, nations have from time to time advanced extravagant pretensions. They have
765 largely acted in assertion of those pretensions upon the consideration, so it must be admitted, of their power to give effect to them. It would be idle and hopeless to undertake the task of justifying on high moral grounds, or on principles of abstract justice and equity, many principles and many acts performed by many Governments at various periods of the world's history. But those are, generally speaking, pretensions of a comparatively remote period, and before the moral force of public opinion of the world was the great controlling power which it is to-day, when the rule of might rather than the rule of right prevailed. Amongst the Powers who advanced those great pretensions, prominent among them, unquestionably, were Great Britain and Spain. They were not the only ones, for there is hardly a great Power of which the same may not be said. Amongst those pretensions were assertions of control, dominion, and sovereignty over a large extent of ocean, without physical boundary, and without any external marks of delimitation; but even in those days of assertions, unjustifiable as I believe them to have been in most cases—certainly in many—I find no record

of any claim to the property embraced in those extended limits over which dominion and sovereignty were so claimed. There was undoubtedly in connexion with those assertions, and consequent upon them, a claim to exclude others from the given area—a claim to exclusive right to deal with whatever was to be found in that given area. But that is a very different thing from an assertion of property in the particular things, the particular animals which may inhabit that area; and I say, subject to be contradicted, but without fear of contradiction, that this is the first time in the history of the world that a nation or an individual has ever claimed property in a free swimming animal in the ocean. I say, further, it follows from what I have already said, that this is the first time that an attempt has been made to differentiate one particular animal from all the other animals that dwell during a large part of their existence in the ocean.

I do not know that my learned friends would even say they were called upon to differentiate the case of the seal from that of other animals. If they made the attempt so to differentiate it, I think they would find it difficult; but to examine that field of enquiry at this moment would be to take me from the line of argument along which I am advancing.

Now, if I am well founded in this observation, it is a startling matter; and one is not surprised, therefore, to note some difficulty in finding any authority, ancient or modern, in support of this novel claim.

It is creditable indeed to the writers and publicists of America to-day that I do not know one among them, and I have made some enquiry in order to inform myself upon the subject, of reputation and authority who has been found to justify the claim which the United States put forward of property in the seal or in the seal-herd. We find a good many who take the opposite view. My learned friend Mr. Phelps indeed, is the patentee of one idea, (if an idea, by the way, can be patented), upon which a great part of the present argument of the United States is based—I mean that idea set forth in his letter, to which I shall hereafter pay some attention, written in September, 1888.

Writers in United States who have opposed the claim.

766

My learned friend has entered the arena of public controversy in this matter; and, in Harper's Magazine for April 1891, he has published an article, very ingenious and able as you would expect, in which he amplified the idea first propounded in this letter of September, 1888. The article is, in fact, the argument which appears under my learned friend's signature in the printed documents before the Tribunal. But he was very speedily answered, and I have got here the answer written by a gentleman whose name was previously unknown to me,—Mr. Robert Rayner.

Mr. PHELPS.—He was unknown to us equally.

Sir CHARLES RUSSELL.—Well, I shall have a word to say about that presently. It was published at Salem, Massachusetts. We shall be able to give you a little later, I think, some account of who this gentleman is; but I am justified in referring to him for two reasons; first of all, because Her Majesty's Ambassador at Washington, Sir Julian Pauncefote, in sending it describes the writer as an eminent jurist, and Sir Julian Pauncefote is not a man who speaks in a haphazard way; but secondly, I will refer to this gentleman apart wholly from any additional weight to be derived from what his position or what his reputation may be, for the intrinsic merits of his answer: it is well worthy of consideration.

Mr. Justice HARLAN.—Is that the same article that appears in volume III of the *British Case*?

Sir RICHARD WEBSTER.—No.

Sir CHARLES RUSSELL.—That is another authority, to whom I shall refer later.

Mr. Justice HARLAN.—There is an article there signed, "Robert Rayner".

Sir CHARLES RUSSELL.—Well, that shows that the members of the Tribunal have been very industrious in reading this literature. I have not noticed it myself but my learned friend, who is very accurate, tells me that it is not the same. However, having called attention to this article, and adopting as my own argument some of the passages in it, I will place it at the disposition of any member of the Tribunal who desires to see it, and who will judge it upon its intrinsic merits.

Mr. PHELPS.—Can you give us a copy? I have never seen it.

Sir CHARLES RUSSELL.—Well, it would have been courteous of the author to have sent you one, certainly.

General FOSTER.—Is it cited in your case?

Sir CHARLES RUSSELL.—It is remarkable that none of your friends have called attention to it.

Mr. PHELPS.—I heard a man had written something; that is all.

Sir RICHARD WEBSTER.—I may say that, at page 345, it is a reply to Mr. Felton.

Sir CHARLES RUSSELL.—At page 12 of this article, the author puts Mr. Phelps' argument, in the following way:—these seals, making
767 their home on American soil, belong to the proprietors and are a part of their property, and do not lose this quality by passing from one part of the territory to another in a regular and periodical migration necessary to their life, even though in making it they pass temporarily through water that is more than 3 miles from land. The simple question presented is whether the United States Government has a right to protect its property and the business of its people from this wanton and barbarous destruction by foreigners, which it has made criminal by act of Congress; or whether the fact that it takes place upon waters that are claimed to be part of the open sea affords an immunity to the parties engaged in it, which the Government is bound to respect. It cannot be doubted that that is fairly stating the pith of my learned friend's contention.

The writer proceeds to answer it thus:

Mr. Phelps thinks that to the "ordinary mind" this question would not be a difficult one.

Probably not because the falseness of premises upon which the alternative is based would escape detection by such a mind,—but any mind with a grain of logic sees at once that Mr. Phelps is merely begging the real question; the primary one which must be settled in his favour before his proposition can be considered and that is: *Can we or any nation have any property whatever in seals or any wild animals found beyond the national territorial jurisdiction?* Of course Mr. Phelps, a past-master in law, knows that in law there is no property right in wild animals whether fish, mammal, or bird outside of territorial limits; that anybody and everybody is free to appropriate or kill them so long as in doing this no right of territory is violated. To enable us to exercise lawfully any right of proprietorship in wild animals like seals we must confine them within our territorial jurisdiction. To allow them to leave our territory, to escape into the "high seas", is to deliver them up to the tender mercies of mankind in general, and to pretend to prevent non-Americans from doing what they like with seals found in the "high seas" is to fly in the face of all international law, and consequently to make ourselves ridiculous.

He then proceeds to argue in the remaining passages closely, with reference to authority, the legal proposition which is there indicated. Nor is this the only gentleman. Dr. Stephen Berrien Stanton of the New York Bar, has written a book, which is published in New York by Albert B. King, Publisher.

Mr. PHELPS.—Can you give us a copy of that?

Sir CHARLES RUSSELL.—It is very distressing that I should be obliged to furnish this American literature to my friends, but I will with the greatest pleasure.

General FOSTER.—Is that cited in your case?

Sir CHARLES RUSSELL.—I do not know, and, with great deference to Mr. Foster, I do not care.

General FOSTER.—We might have searched for it if you had cited it.

Sir CHARLES RUSSELL.—The first Edition was published in 1891. The second was published in 1892. This gentleman examines the question, and examines it from the only point of view in which up to the time of this litigation, if I may so call it, it was presented on the part of the executive authority of the United States: namely, as a question whether or not the United States had by right of sovereignty a
768 right to apply its municipal legislation to the eastern part of Behring Sea, and to base that right upon a derivative title from Russia. And when he comes to examine the question of those exclusive rights he arrives at the conclusion, which the Tribunal I think will not be surprised at, that it is impossible in view of the attitude of the United States itself in 1824, and in view of the attitude of Russia towards Great Britain as evidenced by the treaty of 1825, to assert, or rather, I would say, to substantiate or to support, any claim to exclusive jurisdiction in any part of the Behring Sea. Then he goes on to argue the question from another standpoint. He deals with the plea which my friend Mr. Phelps puts forward, and he argues strongly in favor of insisting on regulations dealing with this particular interest. I do not quarrel with his argument upon that point. I am not using it, nor is it *ad rem* to the point I am now upon—but I wish to state the full effect of it.

Mr. Justice HARLAN.—Does he not recommend prohibition with regard to pelagic sealing?

Sir CHARLES RUSSELL.—I do not think he does. I do not think he says so in terms so far as I recollect.

Mr. Justice HARLAN.—That is my recollection. I have a copy of the book and I think he does.

Sir CHARLES RUSSELL.—I will not be certain. I think what he does say, undoubtedly, is, that whatever is necessary to protect the fur-seals should be done, and very likely the inclination of his opinion is in the direction indicated by the learned Arbitrator. Of that I am not at all sure, but the point he makes is, I think, that as a matter of legal right what should be done cannot be done upon the sole authority of one nation. But, as I say, I am not citing it in that connection for the moment.

Next, there is the article in a magazine called the "Forum" by Professor James Angell: published in November, 1889.

General FOSTER.—He is an American citizen whose name we have heard before. He is a gentleman of eminence, and President of the University of Michigan.

Sir CHARLES RUSSELL.—I am very glad to have had that high testimony in his favor.

General FOSTER.—But he is not a lawyer.

Mr. Justice HARLAN.—He is the same gentleman who was on the Commission relating to the Fisheries on the Newfoundland coast.

Sir CHARLES RUSSELL.—In the beginning of his article, which is on page 92 of the first volume of the Appendix to the Case of Great Britain, he says:

Alaska is now furnishing us with two international questions of some interest and consequence. The first concerns our right (freely exercised of late under orders of our Treasury Department) to seize foreign vessels engaged in catching fur-bearing seals in Behring Sea, many miles away from land, and to send them into port for condemnation and forfeiture.

Mr. PHELPS.—Will you kindly give the date of the article.

769 Sir CHARLES RUSSELL.—November 1889. Then he says:

The second concerns the determination of the boundary between Alaska and British America.

The President and the other members of the Tribunal will appreciate what that means. You recollect, Sir, that the southern portion of what is now called "Alaska" merely consists of a strip, or *lisière*, of the land along the coast, running in front of the British territory. The question of the actual boundary was left more or less in doubt according to the somewhat vague terms of the Treaty of 1825. That is not at all in question in this case, and I merely mention it to explain the second question that he here refers to. Then Mr. Angell proceeds in this article to show what will be found to have a much wider importance than at first sight may appear, that so far back as 1881, Mr. French, the acting Secretary of the Treasury, writing on the 12th March in that year says:

All the waters within that boundary to the Western end of the Aleutian Archipelago and chain of islands are considered as comprised within the waters of Alaska Territory. All the penalties prescribed by law against the killing of fur-bearing animals would therefore attach against any violation of law within the limits before described.

That is territorial jurisdiction, carrying with it the right of legislation as for territory. Then, after stating the legislation upon the subject, he proceeds to say, on page 93:

The question is whether for this laudable purpose of preserving the fur-bearing seals from extinction, and maintaining our undisputed right to control the taking of these animals on the Pribilof Islands, we may rightfully board, search, and seize foreign vessels in Behring Sea more than 3 miles away from land.

The equal right of all nations to use the high seas for any lawful purpose of commerce, navigation, fishing, or hunting is now so universally recognized; the United States have been so constantly the strong defender of this right; we have so vigorously opposed all attempts of Great Britain to search our vessels in time of peace; we have claimed so vehemently the right of fishing in Canadian waters sharply up to 3-mile line from shore, that obviously we must show some very plain and cogent reasons to justify our course in Behring Sea. What reasons have been or can be given?

Our Government has given, so far as is known, no other formal statement than that of Acting Secretary French (above quoted in part) to inform either our citizens or foreign Powers of the precise grounds on which the seizure of British sealers is to be justified. No defence of our action by Secretary Bayard, nor up to the time of this writing, by Secretary Blaine, or Secretary Windom, has been published.

But in our own newspapers editorial writers or contributors have suggested lines of defence of our action. The ground that they have generally taken as the strongest is that Russia exercised exclusive jurisdiction in Behring Sea, and that by the cession of Alaska she transferred to us the right to exercise the same jurisdiction.

Then he proceeds to discuss that question, and he arrives at the conclusion that the Treaties will not support the claim to any exclusive jurisdiction in Behring Sea. He further cites a passage from Governor Boutwell, the Secretary of the Treasury in 1872 in which he said:

I do not see that the United States would have the jurisdiction or power to drive off parties going up there for that purpose, unless they made such an attempt within a *marine league of* the shore.

770 I ought to say in passing that my friends say that Mr. Boutwell's letter had reference to something outside Behring Sea, outside the Aleutians, and therefore that it has not the significance which otherwise might have been attached to it. It is not very important to consider that one way or the other. Then on page 95 he proceeds to consider an argument as regards the seal fishing on the Asiatic coast:

No doubt, the condition of the Siberians on that coast would present a strong case for generous action on the part of foreigners in abstaining from interference with their means of gaining a livelihood. By common consent, out of regard to the hardships of their life, fishermen are not disturbed in their pursuits in time of war. But can the Russian argument, even if it has validity for the Siberians, be used by us? We have without any scruple, for half a century, taken whales in the seas adjacent to them. We can hardly assert with much plausibility that the members of the Alaska Commercial Company, which has the monopoly of seal catching in and near the Pribilof Islands, can plead *in formâ pauperis* for protection on grounds of charity.

It may be argued that since most of the seals which are taken by the British breed on our soil in the Pribilof Islands, we have an exclusive claim to them in the sea, or at any rate a right to protect them there from extinction. But some of them breed on Copper Island and Behring Island, both of which belong to Russia. How is it possible to maintain any claim to ownership in seals on the high seas under any principle of law applicable to wild animals? We can acquire no property rights in animals *feræ naturæ* from their birth on our soil, except for the time that we hold them in our possession. A claim by Canada to the wild ducks hatched in her territory, after the birds have passed her boundary, would seem to be just as valid as ours to seals in the open sea.

I recall only one case which seems to furnish any analogy for the claim that we may regulate seal fishing in the open waters of Behring Sea. The British Government does regulate and control the pearl fisheries in the open sea from 8 to 20 miles west of the northern end of Ceylon. But it is to be presumed that this is done under sufferance of other Powers; because they have had no interest in interfering with the pursuit of the pearl divers. Should they claim the right to seek pearls in those waters, it is not easy to see how Great Britain could oppose any argument, except that of long acquiescence by them, in her exclusive possession of the pearl grounds; and it is questionable whether that argument would have much weight.

It may be said that if we have no right to exclude other nations from taking seals in the open waters of Behring Sea, and if the law and the Treasury Regulations as they now stand can be enforced against our own citizens in those same open waters, we are clearly discriminating against our own countrymen. The foreigners may kill seals at times and in places forbidden to us. This is true. It is one of the anomalies and embarrassments of the present situation.

On the whole, we find no good ground on which we can claim as a right the exclusion of foreigners from the open waters of Behring Sea for the purpose of protecting the seals.

Then having discussed the question as a matter of right, he proceeds to suggest that it is a matter in which other Powers, Great Britain, Russia, Japan and so on, are interested, and that they should and ought to agree to measures for the preservation of the species: this of course is the position we have adopted.

Lastly, I will cite another American publicist, who is editor of a well-known book, which, I, myself, have frequent occasion to use professionally, and which has now reached the 6th. edition. It is an introduction to the study of International law by Theodore
771 Dwight Woolsey—Woolsey's International Law. The edition which is before me is by his son, and certainly he does not mince matters. I need not say that patriotism would suggest to him, if his conscience as a lawyer permitted him—

Mr. PHELPS.—He is not a lawyer.

Sir CHARLES RUSSELL.—Well, if his conscience as a jurist permitted him, to say what he could; but after dealing in section 59 with the broad principle which lies at the root of this matter—that the high sea is free and open to all nations—that it cannot be the property or subject to the Empire of a particular State—that the things in it are free to all to

take them, and so forth, with which I am not now troubling you—the editor adds this paragraph:

The recent controversy between Great Britain and the United States, involving the right of British subjects to catch seals in North Pacific waters, appears to be an attempted revival of these old claims to jurisdiction over broad stretches of sea. That an international agreement establishing a rational close season for the fur seal is wise and necessary, no one will dispute. But to prevent foreigners from sealing on the high sea, or within the Kamschatkan sea (which is not even enclosed by American territory, its west and north west shores being Russian) is as unwarranted as if England should warn fishermen of other nationalities off the Newfoundland banks.

I say it is creditable to the publicists of America that they should take this true juridical and legal view of the contention put forward by the United States.

Mr. Justice HARLAN.—Sir Charles, the Marquis Venosta asks me whether that passage was in the original book of Woolsey, or is it a passage added by his son?

Sir CHARLES RUSSELL.—I said that it was added by the present editor. The original author is dead.

The PRESIDENT.—What is the date of the edition?

Sir CHARLES RUSSELL.—1892. It is the 6th edition.

Now, so far as I know, (I do not, of course, venture to speak on the matter with certainty) only one publication has appeared—I am not talking of newspaper articles and things of that kind, I am talking of persons who write under their own names with some sense of responsibility and with some knowledge of the legal considerations which affect the matter—the only publication which so far has appeared is one the publication of which in its present form, I am told, we owe to the suggestion of one of the Arbitrators, Judge Harlan—I do not know whether that is correct or not. It is an address delivered to the students by Mr. James C. Welling of the Columbian University, professor of the International Law School of the University; and this book, like the others, is at the disposition of any member of the Tribunal who desires to see it.

I will only say, summarising the effect of it, that his whole argument as I have appreciated it, depends upon the correctness of an analogy which he draws between the case of bees and seals; and depends further upon whether he has or has not rightly appreciated certain
772 well known authorities upon the subject of bees; but I conceive (I am not to be deflected from my line of argument to justify myself at this moment) that he is mistaken in both respects. But his argument, of course, is entitled to be treated with respect, and I am entitled to combat his view and the analogy upon which he bases that view when I come to the question of property. At present the Tribunal understands that I am calling attention to the fact that there is nobody of respectable authority that I know of, legal or juridical, to support even at this moment and even in the heat of this controversy, the case which is put forward upon the part of the United States.

Now I have ended the discussion of these matters, which are more or less of a general character, and I end it with this one observation: My aim has been to reduce this question, so far as it is a matter of money interest, to something like what I conceive to be its just proportions.

Mr. Justice HARLAN.—Before you leave that, what is your statement about being indebted to me for that address?

Sir CHARLES RUSSELL.—I do not know how it has reached me, but the statement was that the author had shewn you the paper and that you thought it was worth publication.

Mr. Justice HARLAN.—I never saw a line of the paper before its publication. I remember to have heard President Welling talk on the general subject, and suggested in reply to an inquiry by him as to the propriety of his expressing his opinions, that if he had matured views he could properly give them to the public in some form.

Sir CHARLES RUSSELL.—I have no doubt that is the foundation for it. The only effect on my mind was that I read that with more care and discrimination, as you have seen.

Mr. Justice HARLAN.—He, like President Woolsey and President Angel, are Presidents of Universities in America. Although none of them are trained lawyers, they are gentlemen of wide reading, and stand very high.

Sir CHARLES RUSSELL.—If I were to excise from the voluminous excerpts in the printed argument of my friends all who are not trained lawyers, the residuum would be very small.

Mr. Justice HARLAN.—I did not mean to suggest that you ought to do that, but simply to inform you who they were.

Sir CHARLES RUSSELL.—Quite so, Sir. I was about to say that my object has been to reduce this question, so far as it is a matter of money interest, to something like its just and true proportions, and to dwell upon the novelty of the claim. And now my last word in this connection is to point out in a sentence, emphasizing what my friend Mr. Carter so well said, how much more important the mode of determining this question is than the question itself. My last word in this connection is to point out the grave and far-reaching consequences of a decision which would affirm a property right in this dispute. My friends have said—I do not quarrel with it; they are probably right—that a mere ordinary right of defence of property such as the law recog-
773 nizes, and such as I shall hereafter explain, would be inadequate for the purposes of the protection of the fur-seal in the Behring Sea. I am willing to accept, without argument, their statement for this purpose as correct. They claim that the mere right of defence of possession would be inadequate. They say to give them the effective right of protection, they must have a right of search; they must have a right of seizure; they must have a right of confiscation; and I need not point out that such rights must have not merely a direct effect in interfering with the rights of other nations on the high seas, but must have a direct and serious effect in harassing and interfering with the commerce of the world, which has nothing to do with the question of pelagic sealing at all.

I say, therefore, that this question does involve gravely, does involve directly, the freedom of the seas and the equality of all nations, be they great or small, upon the seas.

Order of the argument set forth.

Now, Mr. President, I proceed to state the order of the argument which I am about to present. I shall, first, consider the facts and circumstances of the seizures of British vessels under the executive authority of the United States Government; for it must not be forgotten, what I took the liberty a good many days ago now of reminding the Tribunal of that the Government of the Queen here is a party complaining that the property of the subjects of Great Britain has been, without legal warrant, seized and confiscated, and some of the crews of those vessels fined and imprisoned, also without legal warrant. It is part of your duty to find the facts in relation to those seizures, though it is not part of your duty to assess the claims for damages in respect to them. I shall then pass to the consideration of the first four questions, grouping them together, in

article VI of the Treaty, the question which we have called the question of derivative right under Russia. I shall then consider question 5, to which the great stress of the argument of my learned friend has been directed; and, following upon that examination I shall, asking for the patience of this Tribunal, examine the cases that have been cited and the propositions that have been based on those cases. And, finally, I shall examine the analogies sought to be drawn from the legislation of other Nations as affording some foundation for the contentions advanced on the part of my learned friend Mr. Carter; especially I shall examine the argument that in the analogy of that legislation of other civilised countries is to be found some warrant for the suggestion that international law sanctions such claims as are here advanced.

THE SEIZURES OF THE BRITISH VESSELS.

I begin, at once, with the question of the seizures.

The PRESIDENT.—You spoke yesterday, Sir Charles, of introducing into the general plan of your argument the two different questions of damages: those with reference to the seizure, and those under the
774 *modus vivendi*. At which moment of your argument do you intend to bring those questions of damages in?

Sir CHARLES RUSSELL.—At the conclusion of all questions of principle.

The PRESIDENT.—In the first part of your argument, before you enter upon the Regulations?

Sir CHARLES RUSSELL.—Certainly.

I was about to draw, as it is right I should, the attention of the Tribunal to what its function is under Article VIII. Under Article VIII, it is provided that

The High Contracting Parties having found themselves unable to agree upon a reference which shall include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it; and; being solicitous that this subordinate question should not interrupt or longer delay the submission and determination of the main questions, do agree that either may submit to the Arbitrators any question of fact involved in said claims, and ask for a finding thereon, the question of the liability of either Government upon the facts found to be the subject of further negotiation.

I should like the attention of my learned friends at this point for one moment. We, I think, agree (it is so stated, I think, in both Cases) that that does not involve the calling upon this Tribunal to deal with any question of amount?

Mr. PHELPS.—It does not.

Sir CHARLES RUSSELL.—No. We agree, therefore, that this Tribunal will not be troubled to assess, as the technical phrase is, the amount of damages. What the Tribunal will be asked to do is to find any question of fact involved in the said claim; and, so far as we are concerned, the simple facts that we request the Tribunal to find will be these. Two of them are undisputed;—first, the fact of the seizures; next, the fact that those seizures were made with the authority of the Executive of the United States,—neither of those facts is in dispute; and the only remaining one, therefore, which we shall ask the Tribunal to find is, that there was no warrant in law, in the circumstances of the case, for the seizure and condemnation of those ships, or the imprisonment of their crews.

Meaning of "liability" in Art. VIII.

Mr. PHELPS.—We should not regard that as a fact, as it seems to be a proposition of law.

Sir CHARLES RUSSELL.—But it must be found as a fact, though I agree it involves a proposition of law.

Senator MORGAN.—It fixes liability, does it not?

Mr. PHELPS.—Of course it does.

Senator MORGAN.—I understand the Treaty does not permit us to fix liability upon either Government, and that would fix liability, would it not?

Sir CHARLES RUSSELL.—Not necessarily; I agree it would go a very long way towards doing so.

775 The PRESIDENT.—I think, Sir Charles, you must make your distinction a little clearer.

Senator MORGAN.—It seems to me it goes the whole length.

The PRESIDENT.—You must make it clear for us that it is not liability.

Sir CHARLES RUSSELL.—Well, you are not to say, "We thereupon award and adjudge that the United States shall pay so much damages". That would be the affirmation of liability; but you are asked to find the facts as to whether the seizures occurred, as to whether they were done with the authority of the United States, as to whether there was any justification in law for them. I do not see how you can escape it; and I think the passage which I am about to read shows that the view of my learned friends was the same. You will see at page 217 of the printed Argument of the United States, a sentence which makes the matter clear.

The claims submitted on the part of Great Britain are for damages sustained by certain of its subjects by reason of the seizure by the United States of certain vessels alleged to belong to such subjects, and warning certain British vessels engaged in sealing not to enter Bering Sea, and notifying certain other British vessels engaged in the capture of seals in Bering Sea to leave said sea, whereby it is insisted that the owners of such vessels sustained losses and damages, as set forth in the respective claims.

Now I call special attention to these next paragraphs:

The right and authority of the United States to protect the seal herd, which has its home in the Pribilof Islands, and in the exercise of such right to make reprisal of seal-skins wrongfully taken, and to seize, and, if necessary, forfeit the vessels and other property employed in such unlawful and destructive pursuit, is a necessary incident to the right asserted by the United States to an exclusive property interest in said seals and the industry established at the sealeries.

We, however, preface what we have to submit on this feature of the case by saying that, if it shall be held by this tribunal that these seizures and interferences with British vessels were wrong and unjustifiable under the laws and principles applicable thereto, then it would not be becoming in our nation to contest those claims, so far as they are just and within the fair amount of the damages actually sustained by British subjects.

I care not in what form it is put; but surely it is a question of fact, aye or no, were the Canadian vessels exercising a right when they were seized; aye or no, was there, in point of fact or of law, any justification for those seizures. I care not whether the result of those findings is or is not necessary to land the United States in liability. If it be so, so much the simpler the question of the settlement of those claims; but it could not have been intended, it would have been an absurdity to suggest that this Tribunal was merely to find the fact that the vessels were seized, and merely to find the fact, which no one has ever disputed, that those seizures took place under the executive authority of the United States. It would be idle to suggest that this Tribunal was called upon merely to determine those facts about which there is no controversy; and it will be observed that the language to which I have called atten-

776 tion in Article VIII appears to give a right to either of these parties, the United States on the one hand Great Britain on the other, to call upon the Tribunal to find any questions of fact involved in the said claims.

I cannot see any question of fact more directly involved in this claim than the question what these Canadian vessels were engaged in when they were seized, or when they were interfered with—whether they were exercising a right, whether they were committing a wrong, whether the United States had the warrant of law, or whether it was a lawless interference and lawless arrest.

Mr. PHELPS.—Perhaps I may suggest to my learned friend one very serious question of fact as it seems to me, as to whether some of these vessels were the property of British subjects at all.

Sir CHARLES RUSSELL.—I am exceedingly obliged to my learned friend for that illustration. It would be a question of fact which might or might not be submitted to this Tribunal; we do not seek to disturb or embarrass the Tribunal; if there be any real dispute of that kind, we are quite willing to leave it entirely an open question.

The PRESIDENT.—That question will perhaps be rather raised by you Mr. Phelps than by the other side.

Mr. PHELPS.—It has been raised in our argument. We do not care to discuss it if the Counsel on the other side do not. It is a fact they may or may not ask the Tribunal to decide. If they do, we dispute it. If they do not we have nothing to say.

Sir CHARLES RUSSELL.—I am obliged to my learned friend for his interposition, because I think it throws some light upon the matter. The finding that the vessels, the names of which appear in the case, have been seized and seized while exercising a legal right would not conclude the liability of the United States to pay if, for instance, it turned out that some of those vessels were owned by citizens of the United States and subject to the laws of the United States.

Lord HANNEN.—Would not that be one of the facts which we might be properly called upon to determine?

Sir CHARLES RUSSELL.—Undoubtedly, my Lord; I have said so; it might be; but it is a fact that as far as I know at present—I have not referred to Mr. Tupper, the Canadian Agent, to have his view in the matter—but so far I have no reason to suppose that that is a matter that we should care to press this Tribunal to embarrass itself with at all; but I shall answer that question at a later stage. For the present, I am content to say that the questions of fact which I submit the Tribunal ought to find are these—the fact of the seizures, which is not disputed: the fact that those seizures were made with the authority of the United States Government: and the fact that the vessels so seized were exercising a right upon the high seas: and finally, the fact, in any form in which it is desired to be couched—I care not what—that there was no warrant in law on the part of the United States for those seizures. I beg to say that the view which I am now presenting
777 is the view presented in the passage from the United States Argument to which I have already drawn your attention, and which is also in the United States Counter Case.

Lord HANNEN.—Does not your contention amount to this, that the question of the liability referred to in the 8th Article means the question of the amount of liability?

Sir CHARLES RUSSELL.—Well, that is one view, but I confess I think the word is more general. I confess the word "liability" is not narrowed, I must say, to the question of amount merely. I think the word "liability" has a wider significance.

Lord HANNEN.—Would not your contention limit it to that sense? You say we are confined to whether it was done wrongfully.

Sir CHARLES RUSSELL.—Certainly, the fact you are required to find must carry with it the consequence that the seizures were wrongful.

Mr. Justice HARLAN.—Is it the fact that they did or did not do it in violation of the law?—is that a fact?

Sir CHARLES RUSSELL.—I think it is.

The PRESIDENT.—Well, I think we will let you argue your point; but this Tribunal must reserve for further consideration whether they will or not take it as a fact.

Sir CHARLES RUSSELL.—I will also respectfully reserve to myself the right of supporting my views, because, knowing what was to be found in the Counter-Case of the United States, I really did not anticipate that there would be any difference between us on this point. It is the first time that it has been suggested to me.

Now I want to call attention to page 133 of the Counter-Case in this connection. I merely refer to it to show that they discuss the questions referred to by my learned friend, Mr. Phelps, suggesting that some of these vessels are not British-owned vessels, and they take the point which my learned friend Mr. Coudert reiterated the other day, that no damages can be awarded for prospective profits, on the ground that they were too remote. My learned friends made the argument under a misapprehension, I think, of the Geneva decision; and then upon page 134 they insist that the damages claimed are excessive; and then comes the final passage, to which I especially desire to call attention.

The United States do not deem it necessary to state in detail wherein the valuations and damages claimed are excessive and exaggerated, or submit proofs in relation thereto, further than by the analysis of said claims found in the Appendix to this their Counter Case, at page 339, for the reason—

Now this is their reason.—

That the "questions of fact involved in the claim" of either of the parties to the Treaty against the other, to be submitted to the Tribunal of Arbitration under the provisions of Article VIII, should, as this Article is understood by the United States, have relation only to such facts as tend to fix the liability of one party to the other, and do not include facts which relate to the amounts of such claims.

Mr. PHELPS.—Certainly.

Sir CHARLES RUSSELL.—Showing that the United States took
778 the view that Lord Hannen has been good enough to express as to what was the limitation of this matter.

The PRESIDENT.—If it is more convenient for you to proceed with your argument, it is understood that the Tribunal reserves for further consideration the question which has been mooted.

Lord HANNEN.—If I may put this question to you, Mr. Phelps; it would assist my understanding, at least, of the point in difference between you, if you could with propriety answer this question: Do you consider that we finding the facts, the United States would in the future negotiations which would take place as to liability be bound by our decision of principle upon the first four questions, or would it still be open to them to say, upon the facts found, we still maintain that we are not liable to pay damages for any seizure?

Mr. PHELPS.—That is a question, my Lord, that I am not prepared at this moment, to express an opinion upon.

Lord HANNEN.—Very well, perhaps you will consider it.

Mr. PHELPS.—I may say that our view of article VIII has been simply this: that any facts which either party requested the Tribunal to find and establish by proof, bearing upon the question of claim for these seizures, would be passed upon and found as might be right by the Tribunal; and thus the whole subject of the liability of the Government

of the United States or of Great Britain to pay any amount, whether found by the Tribunal or not, in respect of those facts, would be left an open question. The material facts as to the seizure of these vessels would seem to me to be these: What vessels were seized? Did they belong to British subjects? Where were they seized? Was any claim made as a ground for seizure, except that they were engaged in the taking of seals? Such facts as that, from which, when found, might be deduced well enough the answer to the question whether upon those facts the United States ought to pay or not.

Lord HANNEN.—Well, that is the whole question over again, and all this Arbitration would go for nothing.

Mr. PHELPS.—Not necessarily.

Mr. Justice HARLAN.—Suppose this Tribunal should decide under the points in Article VI, that the United States had or had not any right of property in the seals, and had or had not a right to protect them on the high seas, you would consider the United States bound by that ruling when the two nations, if the occasion arose, got together in negotiations on the question of damages.

Mr. PHELPS.—I should, Sir, if you put that question to me at this time.

Mr. Justice HARLAN.—That is what I understand Lord Hannen's question to embrace.

Mr. PHELPS.—If that is the purport of the enquiry, Yes. I do not suppose for instance that if this Tribunal should decide that the United States had no right of property, and no right of protection, and that under the circumstances vessels were seized belonging to British
779 subjects, I do not understand that it would be open to the United States after that to insist that there was a right of seizure, and a right of protection, in the face of the decision of the Tribunal.

Lord HANNEN.—I am bound to say that, assuming that that may be taken as *authoritative*, it would meet my question.

The PRESIDENT.—And in that case the liability spoken of in Article VIII would merely refer to the question of indemnity, and then there would be no disagreement.

Mr. PHELPS.—That question, as it seems to me, which was put by his Lordship refers rather to the inference that the United States Government would feel itself bound to draw in respect of the seizure from the decision of the points of law in respect to the other branches of the case.

Lord HANNEN.—Yes. The object of my enquiry would be completely met if it can be taken as authoritative. We will assume for a moment that the finding would be no property. If that can be tacked on to the finding of facts as to the seizure, then that would meet that which Sir Charles has been asking for, a finding that it was an illegal seizure; and, if so, I presume that would satisfy his requirement, as undoubtedly it would meet the view which I intended to indicate in the question I put to you.

Mr. PHELPS.—Your Lordship will see that if you ask the opinion of the Counsel of the United States what would be the just and right course for the United States Government to pursue in the future negotiations if such were the finding of the Tribunal, our answer might be one way. If you ask us if we are authorised here to bind the United States to any conclusion in future negotiations, we must answer that we have no such authority and have no right to make a declaration that would bind them.

Lord HANNEN.—That is why I put in the word "authoritative".

Mr. PHELPS.—We are not authorized to make any such statement, or to give any such assurance. I am free to say, and I believe that to be the view of my associates, that after a finding by the Tribunal upon the five questions involved, it would not seem to me becoming on the part of the United States, who have agreed to abide by this award, to contradict the award when the question of its propriety arose upon this subordinate matter of seizure; but it must be a question for those who control the diplomatic relations of our Government, and is not a question that we are authorised in reference to.

The PRESIDENT.—That is all very well Mr. Phelps; but we have here the United States before us in the persons of their Agent and Counsel, and we have the right to ask them what is the authoritative and official interpretation put by the United States upon one word used in an article of a Treaty which limits our powers. We have the right to ask you what is the interpretation put by the United States upon those words "question of liability"?

780 Mr. PHELPS.—That question the Tribunal is quite entitled to put, and that question we are quite ready to answer. We have endeavoured to answer it;—that in the discussion of questions under article VIII the Tribunal is invested with no authority whatever except to find the facts, leaving the legal consequences of those facts, so far as these seizures are concerned for future consideration.

Then if the Tribunal goes further, and asks me what that future consideration on the part of the United States Government would be, I reply in the first place that I have no doubt that it ought to regard the decision of the Tribunal as conclusive upon the questions arising under this Treaty, but that I am not authorized to go beyond this arbitration and the power with which the Tribunal is invested under this article, and give an authoritative assurance as to what those in charge of the United States Government when that time comes may do. The distinction may be a refined one, but it is one that we feel compelled to make.

The PRESIDENT.—We understand that very well. We merely wanted to know what was your interpretation of these words "questions of liability". We know the interpretation of the English Government.

Mr. PHELPS.—Our interpretation of that is, as I have said, that article VIII simply provides for the finding of such facts—material facts of course—as either party may desire to have found and may offer sufficient evidence in support of. What consequences shall come from that finding is a point that it seems to us is not submitted to this Tribunal. It will be for the after consideration of the Government. But I should not seriously doubt, when you ask my opinion, when those points come to be considered hereafter by the United States Government, that the decision of the Tribunal upon the first five questions will be respected there as elsewhere.

The PRESIDENT.—I think there is no objection to Sir Charles arguing the question of fact, as he understands it. The court will consider whether it is one of those facts which we have to decide upon.

Mr. PHELPS.—General Foster has put in my hands a paragraph in one of the letters of Sir Julian Pauncefote to Mr. Wharton in the course of the negotiation, dated August 26, 1891, while they were discussing this eighth clause. It is on page 330 of the first volume of the Appendix to the United States Case.

He says:

My Government are unable to accept the form of clause proposed by the President because it appears to them, taken in connection with your note of the 23d ultimo, to imply an admission on their part of a doctrine respecting the liability of Govern-

ments for the acts of their nationals or other persons sailing under their flag the high seas which is not warranted by international law and to which they can subscribe.

I need hardly say that the discussion of such a point (which, after all, may ne arise) must prolong the negotiations indefinitely. Moreover, it seems prematur enter into such a discussion before the other questions to be submitted to the Arbi tors have been determined and all the facts on which any liability can arise have b ascertained.

781 I will read a little further down, with the permission of t Court. Sir Julian's suggestion of the form of this article sho what was in the mind of the British Government. On the same pa and further down in the same letter he proposes this clause:

Either of the two Governments may submit to the Arbitrators any question of f which it may wish to put before them in reference to the claims for compensat which it believes itself or its nationals to possess against the other.

The question whether or not, and to what extent, those facts, as determined by Arbitrators and taken in connection with their decision upon the other questions s mitted to them, render such claims valid according to the principles of internatic law shall be a matter of subsequent negotiations, and may, if the two powers ag be referred, in whole or in part, to the Arbitrators.

Sir Julian says: "I do not propose the above wording as definite; it should be o to amendment on either side; but if after submitting", etc.

The remainder is not material.

That shows that the idea of the British Government as expressed Sir Julian Pauncefote then was precisely what I have endeavoured state as our idea now, and I think there is nothing in the correspo ence that will show that that idea was changed or that the langua of the Treaty was modified so as to prevent any different meaning fr what was there expressed. That is to say, that so far as the seizu are concerned the arbitrators simply find the facts, leaving the wh subject then for future negotiation; and therefore, charged as we a authorized as we are, only with the representation of the Governm before this Tribunal upon the points submitted by the Treaty, we a not authorized without communicating with our Government to go a further than that by giving an assurance about further negotiatio At the same time, as I have said, I should not hesitate to express a opinion as to what the result of the finding would probably be on t action of those who represent our Government.

Lord HANNEN.—You will observe, Mr. Phelps, that Sir Julian Paun fote uses an expression the equivalent of one which I have used. says: "Findings of fact are to be taken in connection with the deter nation of the Tribunal upon questions of principle". I used the expr sion: If they were to be one tacked on to the other that would be su cient, supposing it were an authoritative statement.

Mr. PHELPS.—That expression, however, your Lordship, is just t one which was left out of that article when it was put into the trea

Senator MORGAN.—Sir Charles, before you proceed I would like say this: The President of the United States can pledge his Governm diplomatically to entertain or enter into a future negotiation. I have doubt of that; but neither the President nor any of his agents can pled the Government to any particular result of a future negotiation, for t reason that another body has to come in and, by a two-thirds vo ratify and confirm any negotiation before it can become any part the supreme law. Therefore the counsel here, though they might expressly authorized by the President to make pledges to t

782 Tribunal, could not possibly commit the American Governme under its Constitution, by agreeing that a pledge should be e cuted in the form which they might state. It is a peculiarity of *Government that* prevents that result.

Sir CHARLES RUSSELL.—I am quite aware that according to the Constitution of the United States the Executive Government could not enter into a Treaty without the authority and sanction of the Senate.

But, Mr. President, I think we are indebted to Mr. Phelps for his interposition and for his citation from this letter of Sir Julian Pauncefote, because it explains the meaning of the word "liability" as it is used in that paragraph, and it will be found to have no relation whatever, for the reason I will give you in a moment, to the question of the liability of the United States, if in point of fact the seizures were unauthorized.

You will observe that article VIII deals with claims which may be made, either on the part of the United States or its citizens, or on the part of Great Britain and its citizens. You will observe the distinction at once between the two sets of claims. Once it is clear that the acts which are complained of are done with the authority of the Executive of the United States, it becomes the direct act of the United States: there can be no question of the liability of the Government for those acts, if the acts themselves cannot be justified; but, *per contra*, the United States were suggesting that they on behalf of themselves and their citizens might make claims against the British Government in respect of acts done by individual merchant vessels belonging to subjects of Great Britain—not public vessels belonging to the Executive, and not in any way authorized by the Executive. The question raised therefore was whether or not the British Government would be liable for the acts of private citizens in the pursuit of pelagic sealing. Sir Julian Pauncefote says:

> We cannot admit as a principle of international law that a Government is responsible for what is done by a merchant ship that is bearing its flag, unless that Government has done something to adopt its act or taken the responsibility upon itself.

Therefore he says, *quoad* the claim for damages against the Government of Great Britain I am not prepared to admit that, even if it were found that the merchant vessel had done something to the interest of the United States or its citizens, which was without warrant of law, I am not prepared to admit as a principle of international law that my Government is *ipso facto* liable. That is a perfectly intelligible distinction; but it has no relation, no bearing, upon the other branch of liability, namely, the liability of the United States for the acts done under the direct authority of its executive power. I think the distinction is now apparent; and I confess upon reflection that I think that Lord Hannen was right in saying that as regards the word "liability", so far as it concerns claims of Great Britain, it can not in this connection mean anything except the amount of liability.

Lord HANNEN.—I did not intend to express a definite opinion.

Sir CHARLES RUSSELL.—No, no, my Lord; I so understood.

783 In truth when one comes to look carefully at the matter, and my friends are very candid, and I am sure will approach it in a candid spirit, how does the matter in fact stand? They have, *a priori*, in setting out the questions in article V, set out the grounds upon which they justify what they did. "We did what we did because we had rights under our title from Russia to do it—We did what we did by reason of our own inherent rights as owners of territory, and as owners of certain alleged rights incident to territory."

That is their justification for the seizures, and if that justification fails, my learned friends must candidly admit that there is no other justification. I do not care the least about the form of the thing. I want to get at the substance. And if it is clear to the mind of the Tri-

bunal that the two questions hang together, in the sense that if the questions of right are decided adversely to the United States, then there can be no justification for the seizures and there must be consequent liability for the seizures, I care not in what form of mere words that result is arrived at.

But let me finally say that this matter really is concluded from the point of view of the United States by what they themselves have said. What is the meaning of what Mr. Foster says in his very carefully prepared Counter-Case on behalf of the United States? He can only mean one thing when he says at the bottom of page 134:

> The United States do not deem it necessary to state in detail wherein the valuations and damages claimed are excessive and exaggerated, or submit proofs in relation thereto, further than by the analysis of said claims found in the Appendix . . . for the reason that the "questions of fact involved in the claim" of either of the parties to the Treaty against the other, to be submitted to the Tribunal of Arbitration under the provisions of Article VIII, should as this article is understood by the United States, have relation only to such facts as tend to fix the liability of one party to the other, and do not include facts which only relate to the amounts of such claims.

Mr. Justice HARLAN.—Do you understand that to be an admission that we are to find not only such facts, but also on the question of legal responsibility arising out of those facts?

Sir CHARLES RUSSELL.—These are largely mixed questions of fact and law. I think the true meaning—as the Judge is good enough to ask me the question, and I think he is entitled to a direct answer—I think the true meaning of Article VIII is simply this: That this Tribunal is not to have authority to award judgment in damages against the United States; that it is not to have authority to order the United States to pay any sum, much less to fix any sum; but that it has the authority and obligation to find the facts, whether they are partly law or partly fact. Let me point out that it is quite a mistake to suppose that this international Tribunal in affirming propositions of law is affirming propositions of law in the same sense in which a municipal Tribunal would affirm them. Foreign law is a question of fact. If Mr. Justice Harlan, sitting in his Supreme Court in Washington had to determine a question of English law, he would have to determine that, not
784 as a question of law, but as a question of fact. So as regards any other law which is foreign to the Tribunal before which it comes in question; and as regards our view of this matter it will be found that municipal law has a very important part to play in the consideration of this question.

Mr. Justice HARLAN.—May I ask you again, that I may get your exact idea—Suppose in reference to a particular vessel we should find that it was seized at a particular time and at a particular place, having previously found, let me assume for the purposes of the question, that the United States has no property in the seals and no right of protection. Do you insist that we should further find as a fact in the case that the seizures were wrong?

Sir CHARLES RUSSELL.—If no other justification was shown I should say, Yes.

Mr. Justice HARLAN.—What then is left for future negotiation?

Sir CHARLES RUSSELL.—The question of amount.

Mr. Justice HARLAN.—Only of amount?

Sir CHARLES RUSSELL.—The question of amount, and a little more than amount: a question of amount, speaking of the matter in gross; a question of liability as regards items of that amount, as for instance the question of whether the claimants put forward are entitled to claim—whether they are United States citizens. Again, the question of the *principle upon which* the claim is to be assessed, the question raised

by my friend Mr. Coudert as to prospective loss from the non-employment of the vessels, and questions of that kind—every question short of the affirmation of a judgment to pay is what the Tribunal is called upon as against the United States to affirm under Article VIII. That is my contention.

Mr. GRAM.—Will you allow me to ask you a question. Was the insertion of this final sentence which commences with the words, "The question of liability of the Government", etc., due to the observations of Sir Julian Pauncefote in his note cited at page 330?

Sir CHARLES RUSSELL.—My impression is, sir, as far as I can form a judgment, that it probably was in consequence of that statement of Sir Julian Pauncefote; and I have endeavored to explain how in connection with the claim against Great Britain that word would be very properly used.

The PRESIDENT.—So that we would have to find on no question of fact except as to the amount of the liability?

Sir CHARLES RUSSELL.—Practically, in my judgment, it comes to that.

The PRESIDENT.—And that is the way in which you ask us to construe the article.

Sir CHARLES RUSSELL.—I am not calling upon you to say that in express terms; but I say that it practically comes to that.

The PRESIDENT.—And that is the same interpretation you put upon the passage you just read from the United States Counter Case?

785 Sir CHARLES RUSSELL.—Certainly. I think there is no other interpretation that can be put upon it. I will endeavor to formulate in precise language, and put in writing, so that they may be quite under the eye and clearly within the cognizance of the Tribunal, the findings that we should ask you to make. I should have thought that my learned friends and myself,—if they had authority corresponding to the authority that I as a law officer of the Crown have a right to exercise—I should have thought that we could together have determined that as regards these questions of whether the ships were American ships, the circumstances under which they were seized, the places, etc., they are matters with which this Tribunal ought not to be troubled. We are asking this Tribunal to affirm great principles, not to go into these details; and I should have hoped that before this discussion has closed, communication will have been made, if necessary, with the executive of the United States, in order that this matter may be removed from the area of controversy. There ought to be no real dispute between us on this matter.

Senator MORGAN.—The Executive cannot remove it.

Sir CHARLES RUSSELL.—I do not, with great deference, think that it is a question with which the intervention of the Senate would be called for.

Senator MORGAN.—The Senate would have to affirm any new negotiation.

Sir CHARLES RUSSELL.—No, it is a question of executive action under an existing Treaty.

Mr. PHELPS.—We shall be very willing to confer with our learned friends in regard to any questions of fact upon which we can agree, in respect to these matters. Undoubtedly many questions of fact that they may desire to have found we can agree upon; and if we can, we shall be glad to save them and the Tribunal any further trouble.

Mr. Justice HARLAN.—Still, we have upon us the responsibility to make a finding as to those facts.

Mr. PHELPS.—*Certainly.*

The PRESIDENT.—And upon those facts which shall be submitted to us.

Mr. PHELPS.—But upon another class of facts we are not likely to agree.

Senator MORGAN.—I will say for myself that I do not feel at liberty to make a finding upon any state of facts that has not been regularly submitted to this Tribunal under that Treaty. It says "Questions shall be submitted". That means that they shall be submitted in proper form and at the proper time.

Mr. PHELPS.—I quite agree that the finding must be by the Tribunal. What I meant to say was that I am prepared to say to the Tribunal that we have nothing in opposition to certain facts which we are not prepared to dispute.

The Tribunal here adjourned for a short while.

Sir CHARLES RUSSELL.—I will not pursue the discussion upon
786 the construction of article VIII at this moment, but will content myself with saying in relation to it that we think it will assist the Tribunal if we formulate in a written paper the findings which, according to our construction of the Treaty, are findings within the meaning of article VIII, and which the Tribunal should be called upon to affirm. I will take the opportunity of saying that these statements of fact shall be submitted to my learned friend on the other side, so that when he comes to reply we may have his expression, probably of assent, or it may be in part of criticism, of those statements.

The facts of the seizures.

I now proceed to the consideration of the facts relating to the seizures themselves; and it will be convenient if I state briefly to the Tribunal the order of argument that I intend to pursue. I intend to bring before the Tribunal, without any colour, the facts of the seizures and the circumstances which followed them in the order of events. I shall not feel called upon to make much comment in relation to them. I shall then proceed to call the attention of the Tribunal to the diplomatic correspondence, beginning with the protests always persevered in by the British Government, following the seizures when they occurred, and examining the grounds which were put forward by the United States in supposed justification of those seizures. I shall then examine, for an important purpose, the legislation of the United States which became the basis of the judicial proceedings in the Courts in which confiscation of the seized vessels was sought; and lastly I shall examine the judgments of the judges who determined the confiscations.

My objects in doing this are to establish, first, that those seizures were unwarranted in point of law; to establish, next, that the executive action of the United States was based, and based solely, upon their municipal legislation, and upon the ground that the seizures took place where there was territorial dominion of the United States justifying the application of their municipal legislation to that locality: and that nowhere is there to be found any suggestion of the contention now put forward, that those proceedings were really justifiable not under the municipal legislation at all, but were justifiable and can be defended upon the ground that it was merely an invocation of the inherent right to protection which every State has the right to invoke for the protection of its property. Next, and particularly in connection with the proposition last mentioned, I propose to show, that this legislation cannot be treated as being in the nature of executive protective regulations, because it is legislation which is expressly confined, and has been judicially held to be confined, to a definite and defined area, namely the

eastern part of Behring Sea; and that that consideration makes it impossible to treat that legislation as a protective executive act, because the right of protection, if it is a right, of defence of possession, of protection of property, is a right which follows that property wherever it is, and cannot be defined or controlled within defined limits. It
787 will be found later, if it should seem to the Tribunal that in this connection I am somewhat elaborating the point, that this will have a most important bearing upon the area of the dispute between the United States and Great Britain referred to this Tribunal; and a most important bearing also upon what is the limit and extent of the jurisdiction of this Tribunal both as to questions of alleged right and as to questions of regulations.

With that statement I proceed to the facts. I have in preparing my notes for this purpose endeavored to see to which of the many printed documents I could refer with the least inconvenience to the Tribunal; and I find that with hardly an exception all the documents to which I shall have to refer are to be found in the large volume, Volume III of the Appendix to the Case of Great Britain.

It will be found that very frequent references will not be required to the text, because I intend to state the facts in a narrative form, as they do not appear in that volume according to the order of date. The earlier part of my statement will be found on pages 61 and 62, and a little later on pages 22 and 23. Later still it will be found at page 40. Then we have to pass on to pages 334 and 335. There is then a passing reference to the Appendix at page 209. But within those pages practically will be found all to which I am going to refer.

These are the facts, and my friends will no doubt give them the attention they deserve; I think it will be found that I state them correctly.

The Canadian schooners, the "Thornton", "Onward" and "Carolina" were seized by the United States revenue steamer "Corwin" on the first of August 1886. They were towed to Unalaska. I do not stop to point out where they were seized, whether at 30, 40, 50 or 60 miles from the islands. I consider that unimportant because it is admitted that in each case they were seized far beyond the ordinary marginal belt of sea—the three mile limit. The crews of the "Thornton" and "Carolina", with the exception of one man and the captain on each vessel, who were detained at Unalaska, were sent by steamer to San Francisco. They were there turned adrift, while the men of the "Onward" were kept at Unalaska. The schooners and the seals found on board of them were also detained by the United States authorities. The master and mate of the "Thornton" were tried before Judge Dawson of the United States Court at Sitka on the 30th of August, 1886, and were sentenced, the captain, to a fine of $500 and the mate $300, and each was sentenced to be imprisoned for thirty days. In the next month, that is in September, 1886, the masters and mates of the "Carolina" and the "Onward" were condemned to undergo similar fines and similar imprisonment.

There is a painful incident in connection with the master of the "Carolina", who was an old man, and who appears to have been allowed temporary freedom and to have been found dead in some wood to which he wandered. I do not suggest that that was attributable to the direct action of the executive authorities. It is simply a lamentable event in connection with the story.

788 The other masters remaining were imprisoned for some time and finally were turned adrift, not furnished with funds, and left to find their way as best they could to their homes, some 1,500 miles distant.

On the 21st of October, 1886, the formal protest of Great Britain was recorded; and on the 4th of February, 1887, the seizures having been made in August, of 1886, orders were given by the United States Executive to discontinue all pending proceedings, to discharge all the vessels, and to release all the persons who had been arrested in connection with the seizures.

This order was in due course communicated to the United States Marshal at Sitka, who chose, for some reason that I have never yet heard explained, to disregard it absolutely. He appears to have expressed the opinion that this executive order was a forgery. He declined to act upon it. He did not act upon it until a much later period; and it was not until August, 1888—I pray your attention to this—two years after the seizure of these vessels, that effective orders were given for their release; and by the time orders were given for the release of these vessels they were lying high and dry upon the beach where they had been left to rot, in so worthless a condition that it was not considered worth while to retake possession of them for the purpose of conveying them to some port for repair.

I make only one comment upon this story, and these indubitable facts—that I think it would have been almost better if my learned friend Mr. Carter had foreborne making that commendation upon what he called the forbearance and statesman-like humanity which had characterized the Government and the Executive of the United States in this connection.

The vessels, the "Anna Beck", the "W. P. Sayward", the "Dolphin", the "Grace", the "Ada", and the "Alfred Adams", were captured in July and August of 1887. The last mentioned of these, the "Alfred Adams," escaped from capture. The others were taken to Unalaska. The officers and the crews were sent off to Sitka, taken before a judge, and bound over for trial on the 22nd of August; and then, having been kept for trial until the 9th of September, they were unconditionally released. As regards the vessels, they were sold by auction by the United States Marshal on the 26th of March 1889, excepting the "W. P. Sayward", in respect of which a bail bond had been given for her release. Whether that bail bond was paid or sued upon I do not know.

Mr. TUPPER.—No action was taken on it.

Mr. FOSTER.—We suspended action on it.

Sir CHARLES RUSSELL.—It is noticeable in respect of the vessels as to which the order for release was sent at the date I have given, that notwithstanding, after the great delay to which I have adverted, those vessels were released at the time when they proved to be worthless, the authorities sold the stores and other matters in connection with their equipment.

789 Now, what is the case which Great Britain has in point of law to establish in respect of these vessels? It is clear that all that Great Britain has to establish, to found its claim for damages for these vessels in the first instance, so as to make what is called a *primâ facie* case, is the fact of the seizures: this is not denied; next, the fact that those seizures were made with the authority of the United States: this also, is not denied; and therefore, these vessels having been seized on the high sea, the *onus* lies upon those who seek to justify those seizures, to show that they were justified in making them. That state of the case, I am sure, will not be questioned—that once the fact of the seizure upon the high seas is established, and that that seizure was with authority of the United States Government, the onus thereupon lies upon the United States Government, in answer to the claim for dam-

ages in respect to what is *primâ facie* a grievous wrong, the onus lies upon that Government to justify its action upon legal grounds. I will discuss those legal grounds presently.

Correspondence on the seizures.

Now I turn to the correspondence which took place, and I assure the Tribunal that I will not trouble them with more than I can avoid. But it is my purpose, which I wish to make very clear to this Tribunal—though I wish to save them all the time and trouble that I can—it is my purpose that the statement I am now submitting shall cover the whole ground of this case, not perhaps perfectly or completely, but as far as I am able to do it; and I shall leave nothing unsaid which I think ought to be said in this connection, even if it should involve very considerable demands upon the patience of this Tribunal.

I have told you, Mr. President, that the first seizures took place on the first of August, 1886. Information appears to have reached the Foreign Office in London, then presided over by the late Lord Iddesleigh, by the 21st of October of that year; and on page 20 is the first communication to which I need call your attention. It is the second communication on that page. It is addressed to Sir Lionel West, then the representative of Great Britain at Washington:

I have to request you to inform me whether the United States Government have replied to the communication which you were directed to make in my dispatch of the 9th ultimo, regarding the seizure of British vessels in Behring Sea by a United States Revenue cutter. If an answer has been received, I should be glad to receive a report of the substance by telegraph. I should be glad at the same time to know whether any appeal has been lodged against the decision of the United States Court condemning certain British subjects in connection with this matter.

Then at the bottom of that page is the further communication of the 30th of October, which is an important document. It begins—

Her Majesty's Government are still awaiting a report on the result of the application which you were directed by my dispatch of the 9th ultimo to make to the Government of the United States for information in regard to the reported seizure by the United States Revenue Cutter "Corwin" of three Canadian schooners while engaged in the pursuit of seals in Behring Sea.

790 I am inclined to think that this is one of the few letters that it may be desirable to read at length.

(Sir RICHARD WEBSTER thereupon read the remainder of the above letter, as follows:)

In the meanwhile, further details in regard to these seizures have been sent to this country, and Her Majesty's Government now consider it incumbent on them to bring to the notice of the United States Government the facts of the case as they have reached them from British sources.

It appears that the three schooners, named respectively the "Carolina," the "Onward," and the "Thornton," were fitted out in Victoria, British Columbia, for the capture of seals in the waters of the Northern Pacific Ocean, adjacent to Vancouver's Island, Queen Charlotte Islands, and Alaska.

According to the depositions inclosed herewith from some of the officers and men, these vessels were engaged in the capture of seals in the open sea out of sight of land, when they were taken possession of on or about the 1st August last by the United States Revenue cutter "Corwin," the "Carolina," in latitude 55° 52′ north, longitude 168° 53′ west, the "Onward" in latitude 50° 52′ north, longitude 167° 55′ west, and the "Thornton" in about the same latitude and longitude.

They were all at a distance of more than 60 miles from the nearest land at the time of their seizure, and on being captured were towed by the "Corwin" to Ounalaska, where they are still detained. The crews of the "Carolina" and "Thornton," with the exception of the captain and one man on each vessel detained at that port, were, it appears, sent by the steamer "St. Paul" to San Francisco, California, and then turned adrift, while the crew of the "Onward" were kept at Ounalaska.

At the time of their seizure the "Carolina" had 686 seal-skins on board, the "Thornton" 404, and the "Onward" 900, and these were detained, and would appear to be still kept at Ounalaska along with the schooners by the United States authorities.

According to information given in the "Alaskan," a newspaper published at Sitka in the Territory of Alaska, and dated the 4th September, 1886, it is reported:

1. That the master and mate of the schooner "Thornton" were brought for trial before Judge Dawson in the United States District Court at Sitka on the 30th August last.

2. That the evidence given by the officers of the United States Revenue cutter "Corwin" went to show that the "Thornton" was seized while in Behring's Sea, about 60 or 70 miles south-south-east of St. George Island, for the offence of hunting and killing seals within that part of Behring's Sea which (it was alleged by the "Alaskan" newspaper) was ceded to the United States by Russia in 1867.

3. That the Judge in his charge to the jury, after quoting the 1st Article of the Treaty of the 30th March, 1867, between Russia and the United States, in which the western boundary of Alaska is defined, went on to say: "All the waters within the boundary set forth in this Treaty to the western end of the Aleutian Archipelago and chain of islands are to be considered as comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of fur-bearing animals must therefore attach against any violation of law within the limits heretofore described. If, therefore, the jury believe from the evidence that the defendants, by themselves or in conjunction with others, did, on or about the time charged in the information, kill any otter, mink, marten, sable, or fur-seal, or other fur-bearing animal or animals, on the shores of Alaska or in the Behring's Sea east of 193° of west longitude, the jury should find the defendants guilty, and assess their punishment separately, at a fine of not less than 200 dollars nor more than 1,000 dollars, or imprisonment not more than six months, or by both such fine, within the limits herein set forth, and imprisonment.

4. That the jury brought in a verdict of guilty against the prisoners, in accordance with which the master of the "Thornton," Hans Guttounsen, was sentenced to imprisonment for thirty days and to pay a fine of 500 dollars, and the mate of the
791 "Thornton," Norman, was sentenced to imprisonment for thirty days and to pay a fine of 300 dollars, which terms of imprisonment are presumably now being carried into effect.

There is also reason to believe that the masters and mates of the "Onward" and "Carolina" have since been tried, and sentenced to undergo penalties similar to those now being inflicted on the master and mate of the "Thornton."

You will observe, from the facts given above, that the authorities of the United States appear to lay claim to the sole sovereignty of that part of Behring's Sea lying east of the westerly boundary of Alaska, as defined in the 1st Article of the Treaty concluded between the United States and Russia in 1867, by which Alaska was ceded to the United States, and which includes a stretch of sea extending in its widest part some 600 or 700 miles easterly...

That should, of course, be "westerly" from the mainland of Alaska.

In support of this claim, those authorities are alleged to have interfered with the peaceable and lawful occupation of Canadian citizens on the high seas, to have taken possession of their ships, to have subjected their property to forfeiture, and to have visited upon their persons the indignity of imprisonment.

Such proceedings, if correctly reported, would appear to have been in violation of the admitted principles of international law.

I request that you will, on the receipt of this despatch, seek an interview with Mr. Bayard and make him acquainted with the nature of the information with which Her Majesty's Government have been furnished respecting this matter, and state to him that they do not doubt that, if on inquiry it should prove to be correct, the Government of the United States will, with their well known sense of justice, at once admit the illegality of the proceedings resorted to against the British vessels and the British subjects above mentioned, and will cause reasonable reparation to be made for the wrongs to which they have been subjected, and for the losses which they have sustained.

Should Mr. Bayard desire it, you are authorized to leave with him a copy of this despatch.

I am, etc., IDDESLEIGH.

The PRESIDENT.—I suppose there is a mistake in the print as regards the latitude where the "Onward" and the "Thornton" were seized. In this despatch it is marked 50½° north, and that would be out of Behring Sea. I suppose that must be a mistake, because nobody alleges the ships were seized out of Behring Sea.

Sir RICHARD WEBSTER.—I did not read those latitudes because I knew they were not geographically correct. It appears from other papers that they were all seized in Behring Sea.

Sir CHARLES RUSSELL.—The Tribunal will see that this is a very grave allegation. The attention of the Government of the United States is called to it as early as the 9th of October, and one would have expected that in a grave matter of this kind the Executive would have been in possession of complete information as to what the facts were.

Here are two Powers fortunately at peace and in most friendly relations with one another. A number of the vessels of one of those Powers are seized upon the sea, without any suggestion of previous diplomatic representation or expostulation of any kind; and yet as late as the 12th November, if you will turn to page 27, you will
792 find Mr. Bayard (an able and courteous Statesman of the United States, whom I have the pleasure of knowing) writes on that day and says:

The delay in my reply to your letters of the 27th September and 21st October, asking for information, concerning the seizure by the United States Revenue cutter "Corwin" in the Behring Sea, of British vessels for an alleged violation of the laws of the United States in relation to the Alaska seal fisheries, has been caused by my waiting to receive from the Treasury Department the information you desired.....

My application to my colleague the Attorney General to procure an authentic Report of these proceedings was promptly made, and the delay in furnishing the Report doubtless has arisen from the remoteness of the place of trial.

As soon as I am enabled, I will convey to you the facts as ascertained in the trial, and the rulings of law as applied by the Court.

Let me ask the Tribunal to realise the position of things. He has been told that the seizure has taken place in Behring Sea, when these vessels were in pursuit of fur-seals. He has been told that they were seized at distances from land which showed that they were outside the ordinary territorial limits; and yet the Secretary of State cannot give any answer to the challenge of Lord Iddesleigh, who affirms that these facts point to a grave breach of international law, but must wait till he gets the exact information from the place of trial.

Senator MORGAN.—How can that be if the British Government disclaims all responsibility for the conduct of its nationals?

Sir CHARLES RUSSELL.—I am sure it is my fault, Sir; but the appositeness, or connection with my argument, of that remark I fail quite to appreciate.

Senator MORGAN.—I understand that the British Government has disclaimed in the diplomatic correspondence, and excluded from the Treaty, all considerations of responsibility for the conduct of its nationals in taking fur-seals. If that be so, I do not understand why it is that Mr. Bayard was required to make any representation to the British Government about a matter that he wished to redress or prevent.

Sir CHARLES RUSSELL.—Sir, I still fail, with all sincere respect, to see the connection with the argument I am pursuing.

Senator MORGAN.—I regret that you fail to see it.

Sir CHARLES RUSSELL.—I am calling attention to the fact that Lord Iddesleigh has stated facts, which are not contradicted, of the seizure of British vessels on the high sea outside territorial limits; seized not by the act of individuals, but seized by the act of the State through its Executive Authority.

Lord HANNEN.—What is your ground of complaint, Sir Charles? It was necessary to ascertain the facts, and the scene of action was a long way off.

Sir CHARLES RUSSELL.—With great deference, my Lord, No. If the case really were, that they could justify themselves as having a legislative power over Behring Sea, or, which is the case now made, as protecting their property in the fur-seals, there was a prompt and
793 immediate answer. "We have committed no offence against

international law at all." It is one of the many proofs that I am going to adduce that this case which is now presented to this Tribunal——

Lord HANNEN.—I understand that you do not make it a ground of complaint that they took time to ascertain the facts; but you say that they did not take up the ground that they are now taking up.

Sir CHARLES RUSSELL.—Certainly; that is my point; one of the many points which will go to show that as this case developed itself in the diplomatic correspondence, and as it has still further developed itself in the course of the printed argument, it has taken a form that was not present to the mind of the Executive at the time of these occurrences; as it ought to have been present if the case were as real as it is now made out.

That brings us to the 12th of November, 1886. I now refer to page 37 of the same book. We have got to the 8th of January, and Lord Iddesleigh again writes.

Referring to previous correspondence in regard to the case of the three Canadian schooners engaged in the seal fishery in Behring Sea, I transmit to you herewith a copy of a letter from the Colonial Office, with a despatch, and its enclosures, from the Governor-General of Canada, explaining the views of the Dominion Government in the matter.

Nearly four months have now elapsed since my despatch of the 9th September last was addressed to you, in which you were directed to invite the Government of the United States to furnish you with any particulars..... I have now to instruct you to express to Mr Bayard.

and so on.

Thereupon, the next day, as appears at the bottom of the same page, Sir Lionel West communicates with Mr. Bayard; and on the 12th of January, at page 39, Mr. Bayard writes:

Your note of the 9th instant was received by me on the next day, and I regret exceedingly that, although my efforts have been diligently made to procure from Alaska the authenticated "copies"..... I should not have been able to obtain them in time to have made the urgent and renewed application of the Earl of Iddesleigh superfluous.

The pressing nature of your note constrains me to inform you that on the 27th September last, when I received my first intimation from you that any question was possible as to the validity of the judicial proceedings referred to, I lost no time in requesting my colleague the Attorney-General, in whose Department the cases were, to procure for me such authentic information as would enable me to make full response to your application.

Then he says he is awaiting the papers, explains that the distance of the vessels from any land or the circumstances attendant upon their seizure were unknown to him, and then treats it, and quite accurately treats it, as a matter which is of so grave importance that it is right they should be in possession of accurate information. Then, on the 3d of February, which is on the next page, is a further letter, in which he says:

I made instant application to my colleague the Attorney General in relation to the record of the judicial proceeding.

794 and so on.

I am informed that the documents in question left Sitka on the 26th January and may be expected to arrive at Port Townsend, and so on.

and so on.

Then:

In this connection, I take occasion to inform you that, without conclusion at this time of any questions which may be found to be involved in these cases of seizure, orders have been issued, by the President's direction, for the discontinuance of all pending proceedings, the discharge of the vessels referred to, and the release of all persons under arrest in connection therewith.

Now I want to know why this is so. Does any one member of this Tribunal believe that at that time, the Secretary of State being in communication with the Attorney General, as his correspondence shows, and in correspondence (who can doubt it) with the head of the Executive of the United States—I mean the President—that if they had intended to take this ground of legal justification for the seizures, they would not at least have hinted that there existed some such ground and given some indication of what that ground was? On page 85 will be found the official intimation of that release, a telegram from the Attorney General of the 26th January 1887 to Judge Lafayette Dawson and Mr. D. Ball, District Attorney, Sitka, Alaska.

I am directed by the President to instruct you to discontinue all further proceeding in the matter of the seizure of the British Vessels "Caroline," "Onward" and "Thornton" and discharge all vessels now held under such seizure, and release all persons that may be under arrest in connection therewith.

I have told you what was the fate of that telegram—how the order was treated as a forged order: although sent to the Judge (as appears from the order on the same page) how it was not acted upon till the release of the vessels was useless and the men had undergone their imprisonment and suffered the penalty imposed by the judgment.

But that is, of course, a minor point. The question that the Tribunal must ask itself is, is it conceivable that that order for release could have been made upon any ground except one, namely, the advice of the responsible legal adviser of the President, that he was of opinion that it was at least doubtful whether the seizures could in any way be justified.

Senator MORGAN.—Do you mean Mr. Bayard?

Sir CHARLES RUSSELL.—I said the legal adviser, Sir?

Senator MORGAN.—Who is that?

Sir CHARLES RUSSELL.—The Attorney General, Mr. Garland; and in answer to Senator Morgan's question, which he has been good enough to put to me, I can show by the very next page that that was the view of the Secretary of State, Mr. Bayard himself. It is an extract from a paper published in Victoria.

General FOSTER.—All of these are extracts.

795 Sir CHARLES RUSSELL.—Certainly.

Senator MORGAN.—I thought you were reading from the diplomatic correspondence.

Sir CHARLES RUSSELL.—So I was, Sir, but General Foster is referring to an extract on the page in question. Of course, what I have been reading is diplomatic correspondence.

Senator MORGAN.—Yes, I thought so.

Sir CHARLES RUSSELL.—Here is a matter which, if not true, would have been denied: This is the statement in the middle of page 87.

BAYARD'S OPINION.

The following telegram is another unofficial announcement, and seems to be rather out of harmony with the official acts of the commanders of the Revenue cutters.

WASHINGTON, *July 20.*

Secretary Bayard, when he was shown to-day a despatch from Ottawa, stating that the Dominion Government is protesting against the discourtesy shown by the United States authorities in ignoring its demand for reparation for the seizure and detention of the British Columbia Sealers seized in Behring Sea last year, said: "In the first place no demand was ever made to our Government by any body either for the release of the vessels in question or for damages for their detention."

That is quite true.

"And in the second place, if any such demand had been made, it could not have come by any possibility from the Dominion Government, with which we have no diplomatic relations whatsoever."

That is also true.

The vessels in question were released upon representations of the British Government that they were British vessels. They were released because our right to hold them was deemed too doubtful to be enforced. Our Government did what it believed to be right in the matter, without constraint from any quarter.

Senator MORGAN.—Is that a newspaper correspondence quoting Mr. Bayard's statement.

Sir CHARLES RUSSELL.—It is exactly what I read, namely, a telegram which purports to record Mr. Bayard's opinion.

Mr. PHELPS.—In a Canadian newspaper.

Sir CHARLES RUSSELL.—I assure you these interruptions are uncalled for. I do not often complain, but I took pains to state what it was. I read the announcement of it in the paper itself. I said that it appeared in a paper which I named, published in a place I named, and I read the parts of the telegram.

The following document is another unofficial announcement, and seems to be rather out of harmony with the official acts of the commanders of the Revenue cutters.

Senator MORGAN.—I beg your pardon, Sir Charles, for the interference on my part.

796 Sir CHARLES RUSSELL.—No, Sir, not at all.

Senator MORGAN.—But I wanted to find out whether you impute those statements to Mr. Bayard as under his pen, or under his tongue, or as the results of a newspaper correspondence of what he might have said on some occasion.

The PRESIDENT.—You give credit to them for trying to represent, with correctness, the views of Mr. Bayard.

Sir CHARLES RUSSELL.—That, of course, is the point. It attributes to Mr. Secretary Bayard a certain opinion and a certain explanation of a particular course of executive conduct, namely the release of these vessels. That is published in the Press; it is published in our Case, it is part of our original case, and up to this moment it has never been denied; and I say at once, if Mr. Bayard (whom as I have already said I have the honor to know), should say that that was not true, I should accept without hesitation or qualification his statement to that effect. It is a comparatively unimportant point, because, as I said, unless that is true it is inconceivable that if the United States and their advisers had the view of their legal rights which are put forward in a later stage of this diplomatic correspondence—which are put forward in later phases of this, shall I call it "litigation"—it is inconceivable that at the time he gave this order for release Secretary Bayard's real views can have been expressed by such words as these.

"We think we are within our rights in making these seizures; we think that our rights justify us in making these seizures; we base these rights on this ground or on that ground, but as an act of good will to a friendly Government with whom previously we have had no diplomatic expostulations, and to which we had previously given no diplomatic warning—as an act of friendliness and good will to that Government, with whom we are at peace, we will, under the circumstances, release those vessels".

Senator MORGAN.—I am sure, Sir Charles, you will not object to my calling your attention, in vindication of Mr. Bayard, to the fact that in

his correspondence with the British Government on this subject—at least so far as I am advised it is so—he laid aside the question of the merits of seal fishing and seal hunting. All those questions about Behring Sea, and right of property, he set aside, with a view of discussing and settling with Lord Salisbury the question of Regulations. I do not remember that he ever took up the subject of the alleged rights of the respective parties, and dealt with that as an independent topic in his diplomatic correspondence.

Sir CHARLES RUSSELL.—Sir, we are taking time, too literally, by the forelock. We have not got to the portion of the correspondence where that appears. I shall come to that in a few moments. I am dealing with events as they appeared in January 1887: you, Sir, are referring to events as they appeared in August 1887. I will come to them in due course.

797 Senator MORGAN.—I am referring to the same period as you are referring to Sir Charles, in which you were stating, as I understand, that Mr. Bayard should have made an objection at that time to the action of his Government if he had dissented from it, or affirmed it if he approved it.

Sir CHARLES RUSSELL.—I do not say that he should have dissented from the action of his Government at all, because it was, as I take it, his own action to a certain extent.

Senator MORGAN.—I am speaking of the Judges.

Sir CHARLES RUSSELL.—He was a member of the Government. What I am pointing out is, that if there had been any conception of the existence of such legal rights as are now invoked in justification of his conduct, one would have expected to find from Mr. Secretary Bayard, or from some other executive officer, some foreshadowing of these grounds.

Senator MORGAN.—Certainly, if he was dealing with that phase of the question, but I do not think that he was.

Sir CHARLES RUSSELL.—His Government is charged as distinctly as a Government can be charged, in the very long despatch from Lord Iddesleigh that I have read, with a most grave offence against international law. His answer is:—I have released the vessels because I consider it too doubtful whether we were entitled to hold them.

Senator MORGAN.—I do not think he said that.

Sir CHARLES RUSSELL.—At present, the state of the case is, that I cannot affirm that he said it. I do not affirm that he said it, for I do not know. All I know is, that it is published that he said it, and that so far as I know up to this moment there has been no contradiction of the fact.

Lord HANNEN.—Does it appear when the record of the proceedings in the Alaskan Court was received at Washington.

Sir CHARLES RUSSELL.—It was, in fact, received in April 1887. I am now coming to it in the order of time, and Senator Morgan will find that I shall omit nothing which I conceive to be important as throwing light on what were the motives and state of opinion of the Executive at this time.

On the 12th April Mr. Bayard writes to Sir Sackville West in these terms.

SIR: I have the honour to acknowledge your note of the 4th instant relative to the fisheries in Behring Sea, and inquiring whether the documents referred to in my note of the 3rd February relating to the cases of seizure in those waters of vessels charged with violating the laws of the United States regulating the killing of fur-seals, had been received. The records of the judicial proceedings in the cases in the District Court in Alaska referred to were only received at this department on Saturday last and are now under examination.

The remoteness of the scene of the fur-seal fisheries, and the special peculiarities of that industry, have unavoidably delayed the Treasury officials in framing appropriate Regulations, and issuing orders to United States vessels to police the Alaskan waters for the protection of the fur-seals from indiscriminate slaughter, and consequent speedy extermination.

798 The laws of the United States in this behalf are contained in the Revised Statutes relating to Alaska in sections 1956–1971, and have been in force for upwards of seventeen years, and prior to the seizures of last summer but a single infraction is known to have occurred, and that was promptly punished.

That must have been some American sealer, though we have not heard of it before. I do not know the history of it. Then the letter continues:

The question of instructions to Government vessels in regard to preventing the indiscriminate killing of fur-seals is now being considered, and I will inform you at the earliest day possible what has been decided, so that British and other vessels visiting the waters in question can govern themselves accordingly.

I am not asking the assent of the Tribunal or any member of it to any conclusion as I go on, as I have achieved my sole purpose if I have satisfied myself that I am making my motive and my argument intelligible to the Tribunal. We get here, therefore, for the first time a suggestion—not put forward as a justification—but a suggestion, which is a reference to the United States Revised Laws, sections 1956–1971; but there is no suggestion in point of fact in what sense they are supposed to apply.

Now we pass on, and on the 10th of September comes a very important communication, at page 88, from Lord Salisbury. I think this one and one other are the only two that I shall ask to be read in full; but inasmuch as this puts forward the grounds upon which Lord Salisbury supposes it is suggested that the executive action may be excused or justified, I think it desirable that they should be fully read.

Sir RICHARD WEBSTER.—It is on page 88. This is from the Marquis of Salisbury to Sir Lionel West:

FOREIGN OFFICE, *September 10th, 1887.*

SIR: By a despatch of the 30th October last the late Earl of Iddesleigh instructed you to call the attention of the United States Secretary of State to the circumstances of the seizure in Behring's Sea, by the American cruizer "Corwin" of some British Canadian vessels, and his Lordship directed you to state to Mr. Secretary Bayard that Her Majesty's Government felt sure that if the proceedings which were reported to have taken place in the United States District Court were correctly described, the United States Government would admit their illegality, and would cause reasonable reparation to be made to the British subjects for the wrongs to which they had been subjected and for the losses which they had sustained.

By a previous despatch of the 9th September you had been desired to ask to be furnished with any particulars which the United States Government might possess relative to the seizures in question; and on the 20th October you were instructed to enter a protest on behalf of Her Majesty's Government and reserve for consideration hereafter all rights to compensation.

Nearly four months having elapsed without any definite information being furnished by the United States Government as to the grounds of the seizures my predecessor instructed you, on the 8th January last, to express to Mr. Bayard the concern of Her Majesty's Government at the delay, and to urge the immediate attention of the United States Government to the action of the American authorities in their treatment of these vessels, and of their masters and crews.

On the 3rd February Mr. Bayard informed you that the record of the judicial proceeding which he had called for was shortly expected to reach Washing-
799 ton, and that, without conclusion at that time of any questions which might be found to be involved in these cases of seizures, orders had been issued by the President's direction for the discontinuance of all pending proceedings, the discharge of the vessels referred to, and the release of all persons under arrest in connection therewith.

On the 4th of April, under instructions from me, you inquired of Mr. Bayard, in view of the approaching fishing season in Behring's Sea, whether the owners of British vessels might rely when not near land on being unmolested by the cruizers of

the United States, and you again asked when the record of the judicial proceedings might be expected. Mr. Bayard informed you, in reply (12th April), that the papers referred to had reached him and were being examined; that there had been unavoidable delay in framing appropriate Regulations and issuing orders to United States vessels to police the Alaskan waters; that the Revised Statutes relating to Alaska, Sections 1956 and 1971, contained the laws of the United States in relation to the matter; and that the Regulations were being considered, and he would inform you at the earliest day possible what had been decided, so that British and other vessels might govern themselves accordingly.

In view of the statements made by Mr. Bayard in his note of the 3rd February, to which I have referred above, Her Majesty's Government assumed that, pending a conclusion of the discussion between the two Governments on the general question involved, no further similar seizures of British vessels would be made by order of the United States Government. They learn, however, from the contents of Mr. Bayard's note of the 13th August last, inclosed in your despatch of the 15th August, that such was not the meaning which he intended should be attached to his communication of the 3rd February; and they deeply regret to find a proof of their misinterpretation of the intentions of the United States Government from an announcement recently received from the Commander-in-chief of Her Majesty's naval forces in the Pacific, that several more British vessels engaged in seal-hunting in Behring's Sea have been seized when a long distance from land by an American Revenue vessel.

Her Majesty's Government have carefully considered the transcript of record of the judicial proceedings in the United States District Court in the several cases of the schooners "Carolina", "Onward" and "Thornton" which were communicated to you in July, and were transmitted to me in your despatch of the 12th of that month; and they cannot find in them any justification for the condemnation of those vessels.

The libels of information allege that they were seized for killing fur seal within the limits of Alaskan Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States; and the United States Naval Commander Abbey certainly affirmed that the vessels were seized within the waters of Alaska and the Territory of Alaska; but according to his own evidence they were seized 75, 115, and 70 miles respectively south-south-east of St. Georges Island.

It is not disputed, therefore, that the seizures in question were effected at a distance from land far in excess of the limit of maritime jurisdiction which any nation can claim by international law, and it is hardly necessary to add that such limit cannot be enlarged by any municipal law.

The claim thus set up appears to be founded on the exceptional title said to have been conveyed to the United States by Russia at the time of the cession of the Alaska Territory. The pretension which the Russian Government at one time put forward to exclusive jurisdiction over the whole of Behring Sea was, however, never admitted either by this country or by the United States of America. On the contrary, it was strenuously resisted, as I shall presently show, and the American Government can hardly claim to have received from Russia rights which they declared to be inadmissible when asserted by the Russian Government. Nor does it appear from the text of the Treaty of 1867 that Russia either intended or purported to make any such grant; for, by Article I of that instrument, Russia agreed
to cede to the United States all the territory and dominion then posessed by
800 Russia on the continent of America and in the adjacent islands within certain
geographical limits described, and no mention was made of any exclusive right over the waters of Behring Sea.

Moreover, whatever rights as regards their respective subjects and citizens may be reciprocally conferred on the Russian and American Governments by treaty stipulation, the subjects of Her Majesty cannot be thereby affected, except by special arrangement with this country.

With regard to the exclusive claims advanced in times past by Russia, I transmit to you documents communicated to the United States Congress by President Monroe in 1822, which show the view taken by the American Government of these pretensions.

In 1821 the Emperor of Russia had issued an edict establishing Rules for the limits of navigation and order of communication along the coast of the eastern Siberia, the north-western coast of America, and the Aleutian Kurile and other islands.

The first section of that edict said: The pursuit of commerce whaling and fishery, and of all other industry on all islands, ports, and gulfs, including the whole of the north-west coast of America, beginning from Behring's Straits to the 51st degree of northern latitude; also from Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the south Cape of the Island of Urup, viz., to 45° 50′ of northern latitude, is exclusively granted to Russian subjects; and section II stated: It is, therefore, prohibited to all foreign vessels not only to land on the coast land islands belonging to Russia, as stated above, but also to approach them within less than 100 Italian miles. The transgressor's vessel is subject to confiscation, along with the whole cargo.

A copy of these regulations was officially communicated to the American Secretary of State by the Russian Minister at Washington on the 11th February 1822; whereupon Mr. Quincy Adams, on the 25th of that month, after informing him that the President of the United States had seen with surprise the assertion of a territorial claim on the part of Russia, extending to the 51st degree of north latitude on the American Continent and a Regulation interdicting to all commercial vessels other than Russian, upon the penalty of seizure and confiscation, the approach upon the high seas within 100 Italian miles of the shores to which that claim was made to apply, went on to say that it was expected before any act which should define the boundary between the territories of the United States and Russia, that the same would have been arranged by Treaty between the parties, and that to exclude the vessels of American citizens from the shore *beyond the ordinary* distance to which territorial jurisdiction extends has excited still greater surprise; and Mr. Adams asked whether the Russian Minister was authorized to give explanations of the grounds of right, upon principles generally recognized by the laws and usages of nations, which can warrant the claims and Regulations.

The Russian Minister in his reply, dated the 28th February, after explaining how Russia had acquired her possessions in North America said:

"I ought in last place to request you to consider, sir, that the Russian possessions in the Pacific Ocean extend on the north-west coast of America from Behring's strait to the 51st degree of north latitude and on the opposite side of Asia and the islands adjacent from the same Strait to the 45th degree. The extent of Sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to *shut seas* (*mers fermées*), and the Russian Government might consequently judge itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners; but it preferred only asserting its essential rights without taking advantage of localities."

On the 30th March Mr. Adams replied to the explanations given by the Russian Minister. He stated that, with respect to the pretension advanced in regard to territory, it must be considered not only with reference to the question of territorial rights, but also to that prohibition to the vessels of other nations, including those of the United States, to approach within 100 Italian miles of the coasts. That from the period of the existence of the United States as an independent nation
801 their vessels had freely navigated these seas, the right to navigate them being a part of that independence; and with regard to the suggestion that "the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea "because it claims territory both on its American and Asiatic shores", it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, it is not less than 90 degrees of longitude, or 4,000 miles. Mr. Adams concluded as follows: "The President is pursuaded that the citizens of this Union will remain unmolested in the prosecution of their lawful commerce, and that no effect will be given to an interdiction manifestly incompatible with their rights."

The convention between the United States of America and Russia of the 17th April 1824, put an end to any further pretension on the part of Russia to restrict navigation or fishing in Behring Sea so far as American citizens were concerned; for by article 1 it was agreed that in any part of the Great Ocean, commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the High Contracting Powers shall neither be disturbed nor restrained, either in navigation or fishing, saving certain restrictions which are not material to the present issue; and a similar stipulation in the Convention between this country and Russia in the following year (15th May, 1825) put an end, as regarded British subjects, to the pretensions of Russia to which I have referred, and which had been entirely repudiated by Her Majesty's Government in correspondence with the Russian Government in 1821 and 1822, which for your more particular information I inclose herein.

Her Majesty's Government feel sure that, in view of the considerations which I have set forth in this despatch, which you will communicate to Mr. Bayard, the Government of the United States will admit that the seizure and condemnation of these British vessels, and the imprisonment of their masters and crews, were not warranted by the circumstances, and that they will be ready to afford reasonable compensation to those who have suffered in consequence, and issue immediate instructions to their naval officers which will prevent a recurrence of these regrettable incidents.

I am, etc.,

SALISBURY.

Sir CHARLES RUSSELL.—Now the Tribunal will observe that Lord Salisbury is there answering the only case which was put forward, namely the judgment of Mr. Justice Dawson, which resulted in the confiscation of these ships—which resulted, of course, in altering the *property in these ships*; and the surprising thing is—

The PRESIDENT.—The judgment of Judge Dawson was delivered previously to the 3rd of February.

Sir CHARLES RUSSELL.—Oh, long previously.

The PRESIDENT.—It was before the order of release was sent.

Sir CHARLES RUSSELL.—Lord Salisbury had only got before him the record of the proceedings in the Court, and the judgment of the Court of Sitka. That was the only case he had to deal with, and he deals with it in a way I shall have hereafter to refer to in another connection in considering the derivative title claimed under Russia. But will not the Tribunal be surprised to hear that that despatch of Lord Salisbury, written upon the 10th September 1887, received no answer from the representative of the United States, until the year 1890?

If I am wrong in this, let me be corrected on the spur of the moment. That despatch of Lord Salisbury deals with the only case that is suggested—he has got before him the only thing upon which he can form a judgment, namely the record of the proceedings at Sitka, and he proceeds, effectually I submit, to demolish that case. But, that I
802 may omit nothing, let me say that Mr. Bayard *had* done something meanwhile; and what was it? He had written on the 19th August 1887 the letter which has been referred to more than once in the course of the argument by learned friend, Mr. Carter. This letter is not to be found in our appendix: it is not to be found, for the reason that it was not in fact sent to us at all. It was a circular letter addressed by Mr. Bayard to the representatives of the United States in the various capitals of the world. No direct communication of this letter was made to Great Britain, but the communication was shewn or the purport of it notified to us by Mr. Phelps, the then Minister for the United States in London, on the 11th of November 1887.

I will now read that letter, which is in the first Volume of the Appendix to the Case of the United States, page 168. I desire that the Tribunal should have all the materials before them in order to appreciate, in the order of events, the position taken up by the respective Governments.

SIR: Recent occurrences have drawn the attention of this Department to the necessity of taking steps for the better protection of fur-seal fisheries in Behring Sea.

Without raising any question as to the exceptional measures which the peculiar character of the property in question——

That is the fur-seal fisheries——

might justify this Government in taking, and without reference to any exceptional marine jurisdiction that might properly be claimed for that end, it is deemed advisable—and I am instructed by the President so to inform you—to attain the desired ends by international co-operation.

It is well known that the unregulated and indiscriminate killing of seals in many parts of the world has driven them from place to place, and by breaking up their habitual resorts has greatly reduced their number. Under these circumstances, and in view of the common interest of all nations in preventing the indiscriminate destruction and consequent extermination of an animal which contributes so importantly to the commercial wealth and general use of mankind, you are hereby instructed to draw the attention of the Government to which you are accredited to the subject, and to invite it to enter into such an arrangement.

And so on.

This was the departure point of the scheme which contemplated a set of international rules not confined to the United States and to Great Britain, but which should have the concurrence of all the other nations which were, or might be, interested. But, again, am I not justified in asking the Tribunal to note in passing here, that while there is a tentative and indirect suggestion that there may be some other ground upon which the Government of the United States may justify its action,

yet that this ground is not stated as a proposition by which Mr. Bayard desires to bind either himself or his Government, much less is it an affirmation of any legal principle upon which he feels justified in taking his stand? And now, I repeat, is it not an amazing fact that the despatch of Lord Salisbury, which I have ventured to submit
803 demolishes the only case suggested, and suggested too by the judicial record of the proceedings at Sitka, should have remained unanswered—I think it remains unanswered to this day—but remained without any appearance of answer until the 22nd of January 1890, or more than two years after its despatch?

Now, I do not seek to be drawn into any bye-issues. As Lord Salisbury, who had succeeded to Lord Iddesleigh, believed, there had been a breach of a promise made that no further seizures should be effected; and Lord Salisbury records his statement that he had been so assured in a letter of the 8th of April, 1888, which is to found at page 189 of the large volume. It refers to an interview with Mr. Phelps, stating that he was very anxious for despatch because of the destruction of the species which was going on, and which he considered a matter of grave moment; and then he proceeds.

He informed me, therefore, unofficially, that he had received from Mr. Bayard a private letter, from which he read to me a passage to the following effect: "I shall advise that secret instructions be given to American cruizers not to molest British ships in Behring Sea at a distance from the shore, and this on the ground that the negotiations for the establishment of a close time are going on."

And then:

But, Mr. Phelps added, there is every reason that this step should not become public, as it might give encouragement to the destruction of seals that is taking place.

And so forth. It is a bye-point, and I do not seek to dwell upon it. There must have been some misunderstanding because, as a matter of fact, we know that the seizures were renewed.

Meanwhile, there is a change of Government in the United States, and in March, 1889, President Harrison succeeds to President Grover Cleveland; and Mr. Blaine succeeds, as Secretary of State, to Mr. Bayard. And I will only say that I have myself very little doubt (if I may, for the moment, intrude a suggestion of that kind, which means no disrespect to anybody) that judging from the tenor of Mr. Bayard's communications and the position he took up, and the executive action that he authorised and directed,—I cannot doubt that if he had continued Secretary of State, we should have had the case settled as a matter of common interest, and discussed as a matter of common interest, to all the Nations; and certainly some of the portions of the claim now put forward never would have been heard of, because they are inconsistent with the attitude which he himself, in his executive capacity, took up.

But Mr. Blaine, on the 22nd of January, wrote his celebrated despatch, which is known as the *contra bonos mores* despatch; and there is that very great break, partly accounted for by the fact, I admit, that negotiations were going on which it was hoped might end the whole difficulty, but still I cannot believe that if in the minds of the advisers of the United States there had been present, even in a faint degree, the existence of definite legal grounds upon which their action could be defended or justified,
804 that we should not have had some assertion of it at some time or other in answer to these communications of Lord Iddesleigh, in the first instance, and Lord Salisbury, in the second. On the 22nd of January comes this despatch; and I will just notice, in passing,

First appearance of *contra bonos mores* argument.

that, at page 315, there is a letter from Lord Salisbury on the 2nd of October, 1889, in the middle of which he says:

In a despatch to Sir Lionel West dated the 10th September, 1887, which was communicated to Mr. Bayard, I drew the attention of the Government of the United States to the illegality of these proceedings, and expressed a hope that due compensation would be awarded to the subjects of Her Majesty who had suffered from them. I have not since that time received from the Government of the United States any intimation of their intentions in this respect, or any explanation of the grounds upon which interference with the British sealers had been authorised. Mr. Bayard did indeed communicate to us unofficially an assurance that no further seizures of this character should take place.

And so on.

Now, we come to the celebrated *contra bonos mores* despatch, at page 396, dated the 22nd of January. I may relieve the minds of the Tribunal at once by saying that I am not going to read it all, as it has been already read more than once. Of course, if there is any passage in connection with that doctrine which throws light upon it, I will read it if my learned friend suggests. This is the celebrated sentence.

Several weeks have elapsed since I had the honour to receive through the hands of Mr. Edwardes.

Subjects which could not be postponed have engaged the attention of this Department, and have rendered it impossible to give a formal answer to Lord Salisbury until the present time.

In the opinion of the President the Canadian vessels, arrested and detained in the Behring Sea, were engaged in a pursuit that is in itself *contra bonos mores*—a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States. To establish this ground, it is not necessary to argue the question of the extent and nature of the sovereignty of this Government over the waters of the Behring Sea; it is not necessary to explain, certainly not to define, the powers and privileges ceded by His Imperial Majesty the Emperor of Russia in the Treaty by which the Alaskan territory was transferred to the United States. The weighty considerations growing out of that territory, with all the rights on land and sea inseparably connected therewith, may be safely left out of view while the grounds are set forth upon which this Government rests its justification for the action complained of by Her Majesty's Government.

And then he proceeds to argue upon the ground that this is an immoral traffic, that it is a traffic which interferes with the rights of the Government and people of the United States, and then he proceeds, rather adroitly, having made some approaches to argument in support of his own view, to shift the *onus*.

He says at the bottom of page 397:

Whence did the ships of Canada derive the right to do in 1886 that which they had refrained from doing for more than 90 years?

And finally he refers to the fisheries on the banks of Newfound-
805 land as if suggesting there was some parallel, and he refers to dynamite or giant-powder explosions—those I will refer to because they are afterwards used by Mr. Phelps. He asks why the two cases are not parallel. I will attempt to give the answer a little later. And he finally says:

In the judgment of this Government the law of the sea is not lawlessness.

Which is a graceful piece of alliteration.

Nor can the law of the sea and the liberty which it confers and which it protects be perverted to justify acts which are immoral in themselves.

Well I need not say therefore that in this despatch, although he suggests that there may be grounds based upon jurisdiction derived from Russia, his main ground is that the thing is *contra bonos mores*, a crime in itself, a crime which they, the United States, have a right to complain of, because it is an injury *to them*.

Well, now, what is the subsequent course which this correspondence takes? It may be described in a sentence, though I have two more despatches to refer to, one at a little length. Lord Salisbury meets him upon his own ground and says: You say that this is *contra bonos mores;* Have nations said it? You say that this is an injury to your rights. What are your rights? Upon what law are they defensible? By what law are they recognized and protected?

From that moment you will find that Mr. Blaine, driven from his *contra bonos mores* ground, driven from the field, recurs to the Russian derivative title, and thereafter, until he comes to cite with approbation an eloquent passage from a communication of my learned friend Mr. Phelps, we hear no more of the *contra bonos mores* doctrine.

Now, in the few moments that remain, I should like to call attention to that despatch of Lord Salisbury, which I take leave to say is a despatch that has not been answered, and I submit cannot be answered. It will be found on page 462.

In the beginning of that despatch, which I will not read, he repeats, as every fair man arguing is bound to do, fully and fairly what is the contention of his adversary. He says: You say that our vessels were engaged in a pursuit *contra bonos mores:* You say that these fisheries were under the exclusive control of Russia: You say that the seals being taken by pelagic sealing in the open sea will speedily destroy the species. Now how are these arguments taken to pieces?

With regard to the first of these arguments, namely that the seizure of the Canadian vessels in the Behring Sea was justified by the fact that they were engaged in a pursuit that is in itself *contra bonos mores*—a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States, it is obvious that two questions are involved; first whether the pursuit and killing of fur-seals in certain parts of the open sea is, from the point of view of international morality, an offence *contra bonos mores;* and secondly, whether, if such be the case, this fact justifies the seizure on the high seas and subsequent confiscation in time of peace of the private vessels of a friendly nation?

806 Can any one doubt that that is the test which must be applied, and the only test that ought to be applied to the proposition so propounded by Mr. Blaine? You say this pursuit is *contra bonos mores.* I do not agree with you. Has law declared it so? According to international morality even has it been so declared? It does not become immoral according to international law merely because you choose to say it is so! And even if that were so you still lag behind the necessities of your position, because you have still to shew that even if it were *contra bonos mores* international law would justify you in seizing in time of peace and in confiscating the ships of a friendly nation. He then proceeds to argue the broad principles which cannot be doubted, and cites in support of them the utterances of a wise President of the United States (President Tyler) who after stating there was a right to detain and search a vessel on suspicion of piracy goes on to say:

With this single exception no nation has in time of peace any authority to detain the ships of another upon the high seas on any pretext whatever outside the territorial jurisdiction.

Then Lord Salisbury goes on to point out, as I have already taken occasion to point out, that even in the case of the slave trade, a practice which the civilized world has agreed to look upon with abhorrence, the right of arresting the vessels of another country engaged in that trade is only exercisable by special international agreement. And he finally draws this conclusion.

But Her Majesty's Government must question whether this pursuit can of itself be *regarded as contra bonos mores,* unless and until for special reasons it has been agreed *by international* arrangement to forbid it.

Placuitne gentibus? Do the nations of the world agree that this is a thing to be treated as *contra bonos mores*, and to be visited with their condemnation? Then he proceeds.

Fur-seals are indisputably animals *feræ naturæ*, and these have universally been regarded by jurists as *res nullius* until they are caught. No person, therefore, can have property in them until he has actually reduced them into possession by capture. It requires something more than a mere declaration that the Government or citizens of the United States, or even other countries interested in the seal trade, are losers by a certain course of proceeding, to render that course an immoral one.

And so on. And then he comes to the second argument, as regards Russia and as the argument which is there set out, and set out very well, is one which I must refer to myself in some detail, I will spare the Tribunal the reading of it at this stage. Finally, he deals with the question of whether the effect of pelagic sealing is to be treated as a fact beyond denial or doubt—that the taking of seals in the open sea will lead to their extinction; and expresses his view upon a point which deals, not with question of property or property right, but of regulations; and he deals with it upon the information then before him.

807 He says in that regard:

The negotiations, now being carried on at Washington, prove the readiness of Her Majesty's Government to consider whether any special international agreement is necessary for the protection of the fur-sealing industry. In its absence (that is, of international agreement) they are unable to admit that the case put forward on behalf of the United States affords any sufficient justification for the forcible action already taken by them against peaceable subjects of Her Majesty engaged in lawful operations on the high seas.

So that there is the position; and this is the last observation I take leave to make to day; the position from the first taken up and consistently maintained by Great Britain is this "A denial of your right; an utter inability on your part to justify by legal argument, or upon legal grounds, your claim of property, or property right or property interest; an inability on your part, even if you had such right, to justify what you have done in protection of that right. But, at the same time, while your right is denied, while your action, even if the right existed, is unwarranted, still the Government of Great Britain is anxious, is willing, is ready, to join in dealing with this matter by international arrangement, which shall recognise that this is not a matter of exclusive interest in the United States, but a matter of interest to the world."

The Tribunal adjourned till to morrow morning, the 12th of May, at 11-30 o'clock.

TWENTY-SECOND DAY, MAY 12TH, 1893.

Mr. TUPPER.—Mr. President, I would like to say that the reason why none of the proofs of the last day's arguments appear upon the table of the Tribunal this morning is that, yesterday being a Public Holiday, the printers were not at work; but yesterday's report and the report of today's argument will be sent to each Member of the Tribunal on Saturday.

Sir CHARLES RUSSELL.—The Tribunal will remember that the letter of Lord Salisbury of the 22nd of May, 1890, at page 462 of Volume III of Appendix to the British Case, to which I yesterday referred, and to which I intend to make no further detailed reference, took up the three grounds set forth in the argumentative letter of the Secretary of State, Mr. Blaine, of the 22nd of January. It dealt with the question whether the pursuit of fur-seals by pelagic sealing was *contra bonos mores*, and it went to the heart of the question, by putting the single point: Can you say that, in the point of view of international morality, international law has ever declared that it was *contra bonos mores:* your assertion does not make it so?

He then proceeds to deal with the derivative claim under Russia; and, lastly, he deals with the question of fact, as to which he expresses his disagreement, upon the evidence before him, from the view of Mr. Blaine as to the effects of pelagic sealing.

Now, I stated in commenting on that letter that Mr. Blaine's reply, to which I am now going to call attention, and which you will find at page 497 of the same volume, does not make even an attempt to grapple with any except one of the points dealt with in the previous despatch of Lord Salisbury, to which it purported to be a reply. My learned friend, Mr. Carter, speaking almost in a tone of apology for Mr. Blaine, said that he had innocently—I think my learned friend used the word "innocently"—that he had innocently allowed himself to be diverted from the true ground upon which the case of the United States ought to have been based; that he followed the scent of the herring drawn across the track by this astute statesman, Lord Salisbury; and that he did, in his answer to Lord Salisbury's despatch, omit the cardinal point of what is now said to be the United States case.

Mr. Blaine's reply to Lord Salisbury's answer to the *contra bonos mores* despatch.

Now this despatch, which is to be found, as I think I have said, in page 457 of the same book, is one of appalling length. It extends from page 457 to page 506! I follow the example of my learned friend
809 Mr. Carter in declining to read it, and for this reason: I may describe it, and describe it with perfect accuracy, as being an elaborate and very ingenious argument upon the construction of the Treaties of 1824 and 1825; an argument by which Mr. Blaine proves to his own satisfaction that the Ukase of 1821, by which Russia claimed the right to exclude all persons or all ships of other citizens from within 100 miles of the coast, was not affected by the Treaties of 1824 or 1825 at all: that those Treaties operated south of the Aleutian chain; but that the Ukase was recognized and continued to be acted upon, and acquiesced in, so far as Behring Sea was concerned.

Now I am stating his argument fairly I think, and with sufficient fulness. I will not deal with that argument in this connection, for the obvious reason that I must combat his views when I deal with the construction of the Treaties and consider the first four questions of Article V; and, as the Tribunal will see I am endeavoring as far as possible to avoid repeating myself, I must reserve that argument till its proper place in the discussion. The purpose I am now upon is to show to the Tribunal that whereas the case of derivative title under Russia, of exclusive rights and exclusive jurisdiction under Russia, is so prominently put forward in the diplomatic argument, the case which is now relied upon—the inherent right in every nation to exercise such protective measures as its interests in its own view demand—while I will not say is wholly left out of sight, takes indeed a very unimportant place in the discussion. I justify that by making but one reference before I leave this despatch. The whole pith of this argument is summed up on page 506; and at the first sentence on that page the point to which his argument is addressed is brought out.

It only remains to say that whatever duty Great Britain owed to Alaska as a Russian province, whatever she agreed to do, or to refrain from doing, touching Alaska and the Behring's Sea, was not changed by the mere fact of the transfer of sovereignty to the United States. It was explicitly declared in the VIth article of the Treaty by which the territory was ceded by Russia, that the cession hereby made conveys all the right, franchises and privileges now belonging to Russia in the said territory or dominions, and appurtenances thereto.

And he proceeds, and I read this for an additional reason, beyond that of wishing to show his contention:

Neither by the Treaty with Russia of 1825, nor by its renewal in 1843, nor by its second renewal in 1859, did Great Britain gain any right to take seals in Behring's Sea. In fact, those Treaties were a prohibition upon her which she steadily respected so long as Alaska was a Russian province. It is for Great Britain now to show by what law she gained rights in that sea after the transfer of its sovereignty to the United States.

Mr. Justice HARLAN.—Sir Charles, was there a formal renewal of the Treaties in the year he refers to, or was it an inaccurate use of the word?

Sir CHARLES RUSSELL.—Well, Sir, I think it is quite correct.

810 I read that latter sentence for a reason that I think will justify me in the opinion of the Tribunal—That latter sentence is a complete misconception of the legal position of Great Britain in respect of the fishing rights in Behring Sea. We do not assert, we never have asserted, that Great Britain gained by her Treaties any rights in Behring Sea. Russia had no capacity to confer those rights—no power except the power of might, if she tried to exercise it and was successful, to prevent the exercise of those rights. We refer to those Treaties only to show that Russia, having asserted claims which were inconsistent with those rights, withdrew from that assertion, not that she conferred the rights upon us. The rights did not depend upon her or upon her will: they are part of the rights which belong to mankind and to all nations in common.

Then finally, following an ingenious device in argument, he winds up by seeking to put the onus on Great Britain, and asks how the ships of Canada derived a right in 1868 which they had not exercised for 90 years: upon what grounds we can defend in the year 1886 a course of conduct in the Behring Sea which had been carefully avoided ever since its discovery; and finally, by what reasoning her Majesty's Government conclude that an act may be committed with impunity against the rights of the United States which had never been attempted against the same *rights when held* by Russia?

I will only observe in passing that this is quite a mis-apprehension of the position in which the question is to be viewed, and that the latter one of those suggestions begs the question which was really in dispute.

Now I have only one further reference to make to this correspondence, and it is of a general nature. Several subsequent letters passed, Lord Salisbury combating, demolishing as I submit, the argument of Mr. Blaine on the construction of the Treaty; and, finally, with the despatches of 17 December, 1890, the discussion on paper substantially came to an end. That despatch will be found on page 37 of the second part of the large volume. This is a still more appalling letter in point of length, because the letter itself extends from page 37 to page 56, and with its inclosures it extends, I think, to about page 64. I again have pleasure in following the judicious example of my friend Mr. Carter; I will not read it. I give the same reason which I have given in reference to the previous despatch, because I have to deal with that matter as a separate argument.

The whole of this letter is conversant with the same question of justification under derivative right from Russia, with one exception, and that is the exception which is to be found in the concluding part of the letter at page 56. It is the letter which begins with that remarkable statement that my learned friends are not now prepared to endorse or to agree with, on page 37, in which Mr. Blaine, a man of acuteness of mind having obviously carefully studied the question, and having at his command I presume the best legal ability which the Bar of the United States can furnish him with—and we know how high that
811 ability is—states that if Great Britain can show that Behring Sea was included in the phrase "Pacific Ocean" in the Treaties of 1824 and 1825, then the Secretary of State representing the United States, must admit that the United States have no well grounded complaint against her. Now this is a serious statement. It is a statement made after the matter has undergone prolonged. discussion. We have now arrived at the month of December, 1890, the discussion arising out of seizures which had taken place in August, 1886. Therefore, four years and some months have elapsed during which the question has been thrashed out in discussion on both sides: and, as one may naturally presume, discussed in the Cabinet Councils both in Great Britain and in America. Yet here is this statement. "Satisfy us that Behring Sea was included under the description of "Pacific Ocean" in the Treaties of 1824 and 1825, and we admit that we have no well grounded complaint against you". I shall support that proposition of Mr. Blaine in argument. It is the proposition that has to be established, that, unless there was acquiescence, or recognition, or a course of conduct which estops or binds England in relation to asserting rights in Behring Sea, if she shows that Behring Sea was in fact included in the Pacific Ocean, then she establishes two things, first of all, that Russia, if she ever made the assertion, did not persevere in it: and next, if the Treaty does include and cover Behring Sea under the phrase "Pacific Ocean" that it was a clear and distinct recognition by Russia of the rights of Great Britain to fish in Behring Sea. But there is, as I have said, one qualification upon this statement, and it is this; on the 12th September, 1888, my learned friend, Mr. Phelps, had written, not to the Government of Great Britain, but to his own Government a letter which has since become important. It was not communicated to the Government of Great Britain, it lay I will not say "*perdue*", but, unnoticed apparently in the archives of the Foreign Secretary for two years and some months, and Mr. Blaine, coming across it, reproduces it and

hands it down to posterity in his despatch, with which I am now dealing. In introducing it, he says the United States does not claim that Behring Sea is a *mare clausum;* but he goes on to say

At the same time the United States does not lack abundant authority, according to the ablest exponents of international law, for holding a small section of the Behring Sea for the protection of the fur-seals.

What he means by that phrase, I do not know; I cannot even guess. Does he mean that the section from the line of demarcation from Behring Straits traced upon both of the maps, running west of the Pribiloff Islands and between the Commander Islands and the western end of the Aleutian Chain,—does he mean that that is a small section of Behring Sea? I do not know what he means; I do not know whether he had any real conception in his own mind of what he meant; but we have had no explanation. Then he proceeds:

Controlling a comparatively restricted area of water for that one specific
812 purpose is by no means the equivalent of declaring the sea, or any part thereof, *mare clausum.*

Lord HANNEN.—May that not be connected with the proposition made in the previous paragraph, as to a circuit drawn round the island like that which was drawn with reference to Napoleon at St. Helena.

Sir CHARLES RUSSELL.—That, probably, is the idea, my Lord.

Lord HANNEN.—It follows it immediately afterwards.

Sir CHARLES RUSSELL.—I am obliged, my Lord; that probably is the idea; but I have, however, to observe that it is inconsistent with the entire argument in the earlier part of his despatch.

Lord HANNEN.—Yes. It is a fresh proposal.

Sir CHARLES RUSSELL.—I was going to say, my Lord, it was a fresh proposal, probably in reference to the suggestion of the concurrence of Great Britain in Regulations. That may be the explanation of it.

Mr. Justice HARLAN.—The paragraph marked "6" is one of the original six questions.

Sir CHARLES RUSSELL.—Yes; that is probably the explanation.

Then he proceeds to give this quotation from Mr. Phelps' letter, as to which I am doing no discredit to the arguments which are advanced in the printed argument before you when I say, that upon examination that part of it which particularly refers to the supposed claim of property in the industry, and protection which it is claimed is a right incident to that property in the industry—that that argument is but an amplification of this passage from Mr. Phelps' letter.

Now, I have said that that argument, amplified in the printed paper before the Tribunal, I will deal with, of course, in the appropriate order. I am not now upon it; but, before I leave it, I wish to ask the Members of the Tribunal to turn back to page 55: about 20 lines from the bottom of that page, where this sentence occurs:

It will mean something tangible, in the President's opinion, if Great Britain will consent to arbritrate the real questions which have been under discussion between the two Governments for the last four years.

Then he comes to an enumeration practically, if not exactly, in the form in which they stand in the Treaty of Arbitration, of the five questions being those that we have agreed to call, and properly to call, questions of exclusive right and jurisdiction.

Now, I pass from the correspondence; and I am glad to relieve the Tribunal from the necessity for any further reference at this stage to it.

HISTORY OF UNITED STATES LEGISLATION DEALING WITH ALASKA.

I must now call the attention of the Tribunal to the history of United States legislation upon this question so far as it relates to this matter of the fur-seals, and in endeavouring to fix upon the book which
813 will save the members of the Tribunal from endless shifting about of references, I find that the 1st volume of the Appendix of the Case of the United States will be found to contain all of it.

Mr. Justice HARLAN.—Do you mean at page 92?

Sir CHARLES RUSSELL.—I meant page 95, and I refer to page 95 for this reason—because from page 95 there are set out the Revised Statutes, some of which are previously set out in the earlier part.

Mr. Justice HARLAN.—I may explain to you, Sir Charles, that in 1873 went into effect what are called the Revised Statutes of the United States, the main object of which was to put, in the form of a revision the substance of the statutes already in force on the same general subjects.

Sir CHARLES RUSSELL.—So I understand. I am very much obliged for the explanation, Sir. It was indeed on that understanding that I desire to refer to page 95, and I have taken the trouble to examine and to note, and I will give the date, when each of these enactments was originally passed. I will give the date when the particular provision originally became law.

The Revised Statutes of Alaska, sec. 1954.

Now section 1954 became law on the 27th July 1868, and if I might respectfully suggest, it would not be unimportant if the date were noted opposite each of these paragraphs. Now these are the words of section 1954:

> The laws of the United States relating to customs, commerce, and navigation, are extended to and over all the mainland, islands, and waters of the territory ceded to the United States by the Emperor of Russia, by Treaty concluded at Washington on the 30th day of March, A. D. one thousand, eight hundred and sixty seven, so far as the same may be applicable thereto.

Now, no lawyer will doubt that that standing by itself is strictly a territorial statute, that that statute is one which no judge or no lawyer would construe as applying outside the limits of territorial sovereignty of the State which enacted it. Nobody will doubt that. What is doubtful on the construction of the statute itself is what is meant by "the waters of the territories ceded"; and it will be found in all these provisions, (whether by accident or design I know not), that there lurks a grave uncertainty, even down to the very last enactment of 1889, after the questions in controversy between the two Powers have arisen. But I am now submitting, as a lawyer to lawyers, as a matter of construction, that if this came to be construed, as to its application to foreigners not subject to the laws of the United States, no lawyer and no judge would construe it as having effect outside the territorial limits of the State. Those territorial limits of the State might, of course, include portions of water, and in some cases very considerable portions of water; but as regards territory abutting on the open sea, they could, according to international law, only extend to the marginal belt now fixed by common consent of nations at three miles.

Senator MORGAN.—I do not desire, Sir Charles, to disturb you in your argument, but may I call your attention to the fact that in 1846,
814 I think it was, Great Britain and the United States divided the straits of Juan de Fuca, which were the open sea, and part of the North Pacific Ocean, and a sea, by the way, in which the seal herds were found, and where fishing for seal was first started—they divided it

by a line which in no place approached within six miles of either coast, and in many places it is 40 miles away from either coast, and it is the boundary line between Great Britain and the United States now.

Sir CHARLES RUSSELL.—I am aware of that, Sir.

Senator MORGAN.—That destroyed the three-mile territorial limit, as I suppose, and substituted, in place of it, the other line.

Sir CHARLES RUSSELL.—If you, Senator, think this is *ad rem* (and I say it with the unfeigned respect that I desire to pay to your observations) I will endeavor to make some kind of answer. In the first place I should require to know a little more about the precise circumstances of the water which is called the Straits of Juan de Fuca, which leave Puget Sound on the one hand and pass Victoria on the other: whether or not it came within the category of land-locked waters, and so forth.

Senator MORGAN.—They are not land-locked waters.

Sir CHARLES RUSSELL.—I am merely suggesting that I should require to know more about this before expressing an opinion.

Senator MORGAN.—The lakes are I think.

Sir CHARLES RUSSELL.—I should then require to know how far the concurrence of other nations had been given to the arrangement made between the two Powers who owned the adjoining territory; and lastly I should express the opinion, for what that opinion is worth, that if that could be properly called the "high sea", and other nations were not concurring in its appropriation between these two Powers, that the effect of that treaty would be binding on these two Powers, and on these two Powers only.

Senator MORGAN.—I am only speaking of the fact that the United States and Great Britain in their treaties had established the proposition that a water boundary may be established by treaty, and upon the high seas.

Sir CHARLES RUSSELL.—I think it would be founding, if I may respectfully say so, Senator, a tremendous conclusion upon a very small base of premises to say that because, in that particular case, that particular treaty had been entered into, it was the affirmation of a principle of general application.

The PRESIDENT.—The same argument applies as to the line established between Russia and America at the moment of the cession of territory in 1867.

Sir CHARLES RUSSELL.—That was between those two: It would be binding as between those two, but if it interfered with the rights of nations on the high sea it would have no binding force or operation whatever upon them. But I beg with all deference to decline to be called upon to justify everything that the United States has claimed, or even everything that Great Britain has claimed.

815 Senator MORGAN.—I called your attention to it because you seemed to think there was some uncertainty in the Act of Congress on the subject, whereas we consider there is absolute certainty, because we legislated according to our boundaries.

Sir JOHN THOMPSON.—I think it will be found that that was not a Treaty dividing water on the high seas outside the three mile limit, but fixing the boundary line behind which you were to ascertain the respective properties of the nations; and its bearing was ascertained by its course on the high seas.

Sir CHARLES RUSSELL.—I have no doubt about it. But let there be no misapprehension upon what I am now saying. I am not contesting the right of the United States to make any law it pleases over any area it pleases so far as it purports to bind only its own nationals—that is not

my argument at all—I was pointing out that this would be construed to mean one which only applied to foreigners within the territorial limits of the legislative enacting Power. That was my point. But I was pointing out too the uncertainty that, on the face of the Statutes, seemed to prevail even as against their own nationals in the use of the vague words, "and waters of the territory ceded". That is all I desire to say.

Now the next section, section 1955, was passed also in 1868, and it may be convenient to note the date on the margin of that section. It is a section which is in the nature of a revenue section. It says:

The President shall have the power to restrict and regulate or to prohibit the use of fire-arms, ammunition and distilled spirits into and within the Territory of Alaska; the exportation of the same from any port or place in the United States when destined to any port or place in that Territory, and all such arms, ammunition and distilled spirits exported or attempted to be exported from any port or place in the United States, and destined for such Territory, in violation of any regulations that may be prescribed under this section, and all such arms, ammunition and distilled spirits landed or attempted to be landed or used at any port or place in the Territory, in violation of such regulations, shall be forfeited; and if the value of the same exceeds 400 dollars.—

certain consequences are to follow. Then it goes on:

And any person wilfully violating such regulations shall be fined not more than 500 dollars or imprisoned not more than six months. Bonds may be required for a faithful observance of such regulations from the master or owners of any vessel departing from any port in the United States having on board fire-arms, ammunition or distilled spirits, when such vessel is destined to any place in the Territory or if not so destined, when there is reasonable ground of suspicion that such articles are intended to be landed there in violation of law.

And so forth.

It is a convenient opportunity to observe (without discussing it at length, which I must do a little later on) that this is a revenue enactment—an enactment for the protection of the revenue, and the revenue laws are all aimed at the prevention of offences the completion or consummation of which involves an offence on land; it is the
816 bringing things into the territory against the laws of the territory; and for the enforcement of those laws a certain margin outside the three-mile limit, under the principle of what is known as the "hovering Acts", is, by the common consent of a good many nations—I think it would be a little doubtful to affirm it as a principle of international law at this moment, for I think it has not reached that stage—it is simply that a number of nations have agreed to pass laws of that kind for themselves; and where they find their nationals in the case of other Powers attempting to violate those laws, they have acquiesced in their being treated as offenders against the law, and have not intervened to protect them when they believed they were intentionally endeavouring to violate the laws which they had passed.

Senator MORGAN.—Probably it may become international law by long acquiescence.

Sir CHARLES RUSSELL.—Probably its growth may be in that stage of gradual development to which I referred in some introductory observations which I made a few days ago.

Section 1956.

Now section 1956 was also passed in the year 1868. It is these terms:

No person shall kill any otter, mink, marten, sable or fur-seal or other fur-bearing animal within the limits of Alaska territory or within the waters thereof;

There still is the vagueness to which I have referred.

And every person guilty thereof shall, for each offence, be fined not less than 200 dollars nor more than 1,000 dollars, or imprisonment not more than six months, or

both; and all vessels, their tackle, apparel, furniture and cargo, found engaged in violation of this section shall be forfeited. But the Secretary of the Treasury shall have power to authorize the killing of any such mink, marten, sable or other fur-bearing animal, except fur-seals, under such Regulations as he may prescribe; and it shall be the duty of the Secretary to prevent the killing of any fur-seal, and to provide for the execution of the provisions of this section until it is otherwise provided by law; nor shall he grant any special privileges under this section.

Now I make the same comment in passing: there is the vagueness as regards the phrase "within the waters of Alaska territory", leaving it undetermined whether it means the whole of the waters east of the line of demarcation, or whether it means only the ordinary three-mile belt. I am not talking of bays, land-locked waters, or matters of that kind—that will be always understood; but so far as it was limited to the three-mile limit, then it was perfectly within the competence of the United States to bind foreign subjects as well as its own nationals; but if it extended further than those limits, it could have no application to foreigners at all.

Now the next section—section 1957, was also passed in 1868. It says:

Until otherwise provided by law, all violations of this chapter, and of the several laws hereby extended to the Territory of Alaska and the waters thereof, committed within limits of the same, shall be prosecuted in any district court of the
817 United States in California or Oregon, or in the district Courts of Washington; and the collector and deputy collectors appointed for Alaska Territory, and any person authorized in writing by either of them, or by the Secretary of the Treasury, shall have power to arrest persons and seize vessels and merchandize liable to fines, penalties or forfeitures under this and the other laws extended over the Territory, and to keep and deliver the same to the marshal of some one of such Courts; and such Courts shall have original jurisdiction and may take cognizance of all cases arising under this Act, and the several laws hereby extended over the Territory, and shall proceed herein in the same manner and with the like effect as if such cases had arisen within the district or territory where the proceedings are brought.

I merely ask the Tribunal to take notice, in passing, that such Courts are to have *original* jurisdiction. They are "Instance Courts", as they are sometimes technically called.

Section 1958 was also passed in the year 1868, and is in these terms. It is not very important:

In all cases of fine, penalty, or forfeiture, embraced in the Act approved 3rd March, one thousand, seven hundred and ninety-seven, chapter 13, or mentioned in any Act in addition to, or amendatory of such Act, that have occurred or may occur in the collection district of Alaska, the Secretary of the Treasury is authorized

to exercise the power of remission, and so on.

Now comes the first section of the legislation dealing with the Islands of St. George and St. Paul—the first legislative Act of the United States in which the Islands of St. George and St. Paul are directly dealt with, and that was passed on the 3rd March 1869.

The islands of St. George and St. Paul in Alaska are declared a special reservation for Government purposes, and until otherwise provided by law it shall be unlawful for any person to land or remain on either of those islands, except by the authority of the Secretary of the Treasury, and any person found on either of those islands, contrary to the provisions hereof, shall be summarily removed; and it shall be the duty of the Secretary of War to carry this section into effect.

I have no comment to make on that except to observe that it was entirely within the competence of the Legislature of the United States to make that provision, if it desired, binding on the whole world. It was their territory; they had the right to say who shall and who shall not land there.

Sir JOHN THOMPSON.—Can you give the date of that?

Sir CHARLES RUSSELL.—It became law on the 3rd March, 1869.

The next section, 1960, was passed on the 1st July, 1870. I might indeed, if I wished to divert from the line which I am upon, and if I were to follow the broad and generous lines of my friend Mr. Carter's argument, have pointed out that this attempt to prohibit access of other persons, and so shut out this island from the commerce of the world, would hardly be in accordance with my friend's broad and generous conception of the duties and rights of nations; but I do not dwell on that topic.

Now section 1960 provides:

> It shall be unlawful to kill any fur-seal upon the islands of St. Paul and
> 818 St. George, or in the waters adjacent thereto, except during the months of June, July, September and October in each year; and it shall be unlawful to kill such seals at any time by the use of fire arms, or by other means tending to drive the seals away from those islands, but the natives of the islands shall have the privilege of killing such young seals as may be necessary for their own food and clothing during other months, and also such old seals as may be required for their own clothing, and for the manufacture of boats for their own use; and the killing in such cases shall be limited and controlled by such regulations as may be prescribed by the Secretary of the Treasury.

Well, so far as this deals with the killing of seals upon the islands, again, of course, it is perfectly competent to bind the whole world. Of course you cannot kill seals on the land unless you are on the land or very close to it on the territorial waters; and therefore it is within the competence of the United States, by the use of the words in that section "or in the waters adjacent thereto", construed as a Judge or a lawyer would construe them, still to mean (unless there was something in the context which showed a different meaning was intended), the marginal belt of three miles; the principle of course being, *Terræ dominium finitur ubi finitur armorum vis.*

Section 1961, passed in the year 1870, provides:

> It shall be unlawful to kill any female seal, or any seal less than one year old, at any season of the year except as above provided: and it shall also be unlawful to kill any seals in the waters adjacent to islands of St. Paul and St. George, or on the beaches, cliffs, or rocks where they haul up from the sea to remain; and every person who violates the provisions of this or the preceding section shall be punished for each offence—

And so on.

I make as to that the same comment which I made with regard to the previous section.

Section 1962, which was also passed in 1870, is in these terms:

> For the period of 20 years from the first July, one thousand eight hundred and seventy, the number of the fur-seals which may be killed for their skins upon the island of St. Paul is limited to seventy-five thousand per annum; and the number of fur-seals which may be killed for their skins upon the island of St. George is limited to twenty-five thousand per annum.

But the Secretary of the Treasury may limit the number. There is no objection to that; it is quite within the competence of the Legislature.

Section 1963 was also passed in the year 1870; and this becomes a little important:

> When the lease heretofore made by the Secretary of the Treasury to the Alaska Commercial Company of the right to engage in taking fur-seals on the islands of St. Paul and St. George pursuant to the act of the 1st July 1889—

I do not know what that Act is. I think we have not got it—however it is not important.

General FOSTER.—It is the Act authorising the lease.

Sir CHARLES RUSSELL.—I thank you; that I gathered; but I think it is not set out.

819 General FOSTER.—Not here.

Sir CHARLES RUSSELL.—It was the first Act authorising the lease:

When any future similar lease expires, or is surrendered, forfeited or terminated, the Secretary shall lease to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, their comfort, maintenance, and education, as well as to the interests of the parties heretofore engaged in trade, and the protection of the fisheries, the right of taking fur seals on the islands herein named, and of sending a vessel or vessels to the islands for the skins of such seals, for the term of twenty years at an annual rental of not less than fifty thousand dollars, to be reserved in such lease and secured by a deposit of the United States bonds to that amount; and every such lease shall be duly executed in duplicate and shall not be transferable.

Mr. Justice HARLAN.—Sir Charles, if I might interrupt you for a moment, you read that as if it referred to an Act passed in 1889. It is *Chapter* 1889, and the Act of the first July 1870. No doubt you will find that provision in the act of 1870.

Sir CHARLES RUSSELL.—I think very likely you are right, Sir. I misread the chapter for the year. Now section 1964 says:

The Secretary of the Treasury shall take from the lessees of such islands in all cases a bond—

And so on. I need not trouble about that.

Then section 1965, passed in the same year, says:

No persons other than American citizens shall be permitted, by lease or otherwise, to occupy the islands of St. Paul or St. George, or either of them, for the purpose of taking the skins of fur-seals therefrom, nor shall any foreign vessels be engaged in taking such skins; and the Secretary of the Treasury shall vacate and declare any lease forfeited if the same be held or operated for the use, benefit or advantage, directly or indirectly, of any person other than American citizens.

I am afraid with regard to this provision the idea of trusteeship for the benefit of mankind was not quite present to the mind of the framer of this particular provision.

Now section 1966, which was also passed in the year 1870, says:

Every lease shall contain a covenant on the part of the lessee that he will not keep, sell, furnish, give or dispose of any distilled spirits or spiritous liquors—

I need not trouble you with that.

Now section 1967, passed also in the year 1870, provides:

Every person who kills any fur-seal on either of those islands, or in the waters adjacent thereto, without authority of the lessees thereof, and every person who molests, disturbs, or interferes with the lessees, or either of them, or their agents or employés in the lawful prosecution of their business, under the provisions of this chapter, shall for each offense be punished as prescribed in section nineteen hundred and sixty-one; and all vessels, their tackle, apparel, appurtenances and cargo, whose crews are found engaged in any violation of the provisions of the sections nineteen hundred and sixty five to nineteen hundred and sixty eight, inclusive, shall be forfeited to the United States.

Senator MORGAN.—What is the penalty attaching to the provision in the last sentence that you read Sir Charles?

820 Sir CHARLES RUSSELL:

Every person who kills any fur seal on either of those islands or in the waters adjacent thereto, without authority of the lessees thereof—

Senator MORGAN.—The last clause.

Sir CHARLES RUSSELL.

And every person who molests, disturbs, or interferes with the lessees, or either of them, or their agents or employés in the lawful prosecution of their business under

the provisions of this chapter, shall for each offence be punished as prescribed in section nineteen hundred and sixty one; and all vessels, their tackle, apparel, and appurtenances, and cargo, whose crews are found engaged in any violation of the provisions of sections nineteen hundred and sixty-five to nineteen hundred and sixty eight, inclusive, shall be forfeited to the United States.

Senator MORGAN.—The forfeiture applies to all those offences?

Sir CHARLES RUSSELL.—Yes.

Senator MORGAN.—I am mistaken. I thought it applied only to the killing of female seals.

Sir CHARLES RUSSELL.—Not at all, Sir; this section makes it an offence to kill any fur seal on either of the Islands without the assent of the lessees. It makes it an offence to kill any fur seal "in the waters adjacent thereto"—whatever those words mean. It makes it an offence also for any person to molest, disturb or interfere with the lessees in the lawful prosecution of their business; and it attaches to all those offences the consequences to be found in the sections referred to, which include fine and imprisonment; and it also attaches the further sanction and penalty that the vessels, apparel, and so on, shall be forfeited to the United States.

I need not point out this is a very wide reaching section, perfectly within the competence, again, of the United States to pass, so as to bind its own nationals, perfectly competent for the United States to pass so as to bind all within the extent of its territorial dominion, but not beyond.

Senator MORGAN.—Would it be competent to treat it as a hovering Act, to prevent an offence against the revenue?

Sir CHARLES RUSSELL.—Certainly, if an offence is contemplated to be committed on the territory, which is the principle of the revenue Acts, certainly, within the limitations and qualifications which I shall have to explain when I deal with that subject. Applied, as you will see this municipal law has been applied, it means this, that anyone who kills a fur-seal any where east of the line which has been called, for brevity, the line of demarcation, is (as it has been construed) liable to fine, imprisonment, and to the forfeiture of the ship to the United States. Section 1968 which was also passed in 1870, is:

If any person or Company, under any lease herein authorized knowingly kills or permits to be killed any number of seals—

and so on, there are penalties. Then section 1969, also passed in 1870 is

In additional to the annual rental required to be reserved in every lease—

821 there is the annual tax or duty of two dollars on each fur skin. Then section 1970, also passed in 1870, provides.

The Secretary of the Treasury may terminate any lease given to any person, company or corporation, on full and satisfactory proof of the violation of any of the provisions of this chapter, or the regulations established by him.

that is, the Secretary of the Treasury. Then section 1971.

The lessees shall furnish to the several masters of vessels employed by them certified copies of the lease, which shall be presented to the Government revenue officer.

I need not read that. And then section 1972,

Congress may, at any time hereafter, alter, amend, or repeal, sections from 1960 to 1971, both inclusive, of this chapter.

That is to say, to turn back for one moment, section 1960 is the one which makes it unlawful to kill any fur-seal on the islands or in the waters adjacent thereto except in particular months: Section 1961 makes it unlawful to kill any female seal—those are the particular sections of importance: Congress may alter or repeal those sections, a pro-

vision which I do not myself appreciate. I should suppose it was always in the competence of the Legislature, by a subsequent provision, to repeal them.

Mr. Justice HARLAN.—I can tell you briefly the history of those words in our Statutes.

Sir CHARLES RUSSELL.—It would be interesting, Sir, no doubt.

Mr. Justice HARLAN.—Our Constitution says that no State shall pass a law impairing the obligation of contracts, but these provisions are not applicable to Acts of Congress. The words referred to by Counsel were inserted to avoid any question of the Legislature divesting vested rights. Charters frequently reserve the right to alter or amend, to prevent any question being raised that subsequent legislation deprived a party of vested rights.

Sir CHARLES RUSSELL.—The next section became law on the 5th March, 1872, and that is section 1973.

Mr. GRAM.—When was section 1972 made law?

Sir CHARLES RUSSELL.—That became law in 1870. By section 1973 the Secretary of the Treasury is authorized to appoint one agent and three assistant agents; and by section 1974, also passed in 1872, they are to receive a certain amount of pay. By section 1975 the agents are not to be interested in any lease, and by section 1976 they are empowered to administer oaths. All those sections were passed in 1872, but they are not very material.

Now the next legislative Act is Chapter 64, on page 99 of this volume. It became law on the 24th March 1874, and it provides that

> An Act to amend the Act intituled "an Act to prevent the extermination of fur-bearing animals in Alaska", approved July 1st 1870, is hereby amended, so as
> 822 to authorize the secretary of the Treasury, and he is hereby authorized to designate the months in which fur seals may be taken for their skins on the Islands of St. Paul and St. George in Alaska, and in the waters adjacent thereto, and the number to be taken on or about each island respectively.

Now up to this time the Tribunal will perceive that two expressions have been used. So far as regards water, which is the point in question, in describing the extent of the application of the legislation in the Statute of 1868, the laws relating to commerce and to navigation—I do not stop to observe upon the consequences of this extension of the laws of commerce—are extended among other things over all the mainland, islands and waters of the territory ceded. That is one expression; but in every subsequent enactment down to 1889, which I have not yet touched upon, the words are "and waters adjacent thereto". It stands thus: "the law is to extend to the mainland, islands and waters of the territory ceded"; and the alternative expression is "waters adjacent thereto".

Statute of 1889.

Now, in 1889, an important Act was passed; and, before I call attention to this legislation, I ask permission for one moment, because it is matter of interest and, I think, not without importance, to show what was the state of opinion in America among its most distinguished and influential citizens and legislators upon this subject of public fishing rights in waters adjoining a particular territory. I mention it here, as I always try to do, in the order of time. We have got now to the eve of the legislation of 1889. There was then existing another dispute between Great Britain and the United States. Of course, there is an eastern as well as a western coast of America, and the question arose as to what were the rights of the United States to fish in the waters adjoining Canadian territory, Newfoundland, and so forth; and there was a certain amount of friction existing between the two

nations on the subject, and a distinguished English Statesman, Mr. Chamberlain, was despatched in 1888 upon a pacific mission to America. The matter finally resolved itself into a very small and fine point. The general rule as to the three miles from the shore as an international principle was hardly in question; but the point arose how it was to be applied in the case of embayed waters. On the part of Canada, it was claimed that, where the bay ran to a considerable extent into the territory of Canada, that the Canadians should have exclusive rights even if the mouth of the bay was more than 6 miles wide, that is to say if it was of greater width than it could be protected by the *vis armorum*—three miles on each side. They contended for a wider application. That was resisted by the United States; they claimed that they had the right to enter any bay which was wider at its mouth than six miles, and had the right to fish up to within 3 miles of the coast of that bay, following from point to point the sinuosities of the bays; and, finally, the majority of the Senate recommended, for the settlement of the differences, that the limits should be fixed at 10 miles; that is to say, that wher-
823 ever at the mouth of the bay the land approached within 10 miles, the exclusive right should be considered as belonging to the Power owning the territory. The matter came to be discussed in Committee, and among the influential Members of the Committee was one of your distinguished body; and he, with three other gentlemen, signed a minority report. The signatures are those of John T. Morgan, Eli Salisbury, Joseph E. Brown, and H. B. Payne; and their argument was a very sensible one; they did not want this restricted limit. I am reading from the Senate "Miscellaneous Documents", 1st session, 50th Congress, Volume 2, page 65. The gentlemen who formed this minority had very wisely in their minds the fact that I have mentioned, that this great Power, the United States, has interests on both sides, west and east; and this is the language they use in their Report:

> A vast extent of the coast of the Pacific reaching to the Arctic Circle, and destined to become a more important fishing ground than the Atlantic coasts, must be affected by the principles of international law which the United States shall assert as defining the limits seaward from the coast of our exclusive right to fish for seals and sea otters and whales, and the many varieties of food fishes that swarm along the coast of Behring Sea and the Straits. We might find in that quarter a very inconvenient application of the doctrine that by the law of nations the three mile limit of the exclusive right to fishery is to follow and be measured from the sinuosities of the coasts of the bays, creeks and harbours that exceed six miles in width at the entrance, and an equally inconvenient application of our claim for full commercial privileges in Canadian Ports for our fishermen when applied to British Columbian fishermen in our Pacific Ports, which are nearer to them than to our fisheries in Alaska.

There is a great deal of weight, I need not say, looking to the source from which it comes, in that statement; but I call attention to it in view of the broad suggestion which is now propounded, that at the very time that these statesmen were considering this matter in 1888, the United States asserted that she had, first of all, under her title from Russia, and next as inherent in her right of territorial dominion, the right of stretching out its arm of authority over the whole of Behring Sea and to exclude others from the pursuit of seals and sea-otters and whales,—and I do not see why it should stop at fur-seals or at the many varieties of food fishes that swarm along the coast of Behring Sea and the Straits,—I say this is very strong evidence, indeed, that that principle of international law to which we have adverted was a principle recognized by the public men of authority in the United States; but that what this minority was struggling against,—and in the point of view of international interests I do not complain of their *struggling against it*—was a limitation in the application of principle

on the east coast of America which might conflict with some interests they would feel bound to assert or feel justified in asserting on the other coast.

Senator MORGAN. That treaty was rejected by the Senate.

Sir CHARLES RUSSELL. It was, quite true, as I am glad to be reminded by the Senator. They took the narrow line. They were for close and strict limitation.

824 Now, before I call the attention of the Tribunal to this Statute of 1889, as to which I must make some comment, I wish to give its history. It is not long, and if the Tribunal will turn to the original Case of Great Britain, the history there begins on page 123. I hope I need not remind the Tribunal of the point to which all this discussion is tending. I am upon the question of seizures, and I am pointing out that the seizures were based upon municipal legislation and upon municipal legislation alone; and I want to demonstrate only that the theory which is now put forward was never dreamt of until at a later stage of the discussion some ingenious mind suggested it.

In 1889, what was the state of things, to begin with? The state of things was this; that three years before, namely in 1886, vessels of subjects of the Queen had been seized for fur-sealing in Behring Sea; that those seizures had been repeated in 1887; that there had been no seizures in 1888; I think that seizures were further repeated in 1889. Now that was the state of the case; and you have seen from the diplomatic correspondence up to that time what was the attitude and the justification of the United States. I will read from the Case, p. 123.

During the fiftieth session of the House of Representatives, in 1889, the Committee on Marine and Fisheries was directed "to fully investigate and report upon the nature and extent of the rights and interests of the United States in the fur-seals and other fisheries in the Behring Sea in Alaska, whether and to what extent the same had been violated, and by whom; and what, if any, legislation is necessary for the better protection and preservation of the same!"

The Committee reported, upholding the claim of the United States to jurisdiction over all waters and land included in the geographical limits stated in the Treaty of Cession by Russia to the United States.—

Senator MORGAN.—That was a House Committee, was it not?

Sir CHARLES RUSSELL.—Yes; it is called a Committee of the House of Representatives. I need not stop to point out that that was an assertion of territorial dominion over that area.

The Committee reported, upholding the claim of the United States to jurisdiction over all waters and land included in the geographical limits stated in the Treaty of Cession by Russia to the United States, and construing different Acts of Congress as perfecting the claim of national territorial rights over the open waters of Behring Sea everywhere within the above-mentioned limits.

The report states:

The territory of Alaska consists of land and water. Exclusive of its lakes, rivers, harbours, and inlets, there is a large area of marine territory which lies outside of the three-mile limit from the shore, but is within the boundary-lines of the territory transferred by Russia to the United States.

And the Report concludes thus:

That the chief object of the purchase of Alaska was the acquisition of the valuable products of Behring Sea.

I need not point out that the fur-seal is not the only valuable product of the Behring Sea, and that that is an assertion of territorial
825 dominion and sovereignty, which, of course, carries with it, if well-founded, the exclusive right to take the products, whatever they are, of that Sea.

That at the date of the cession of Alaska to the United States, Russia's title to Behring Sea was perfect and indisputed.

That, by virtue of the Treaty of Cession, the United States acquired complete title to all that portion of Behring Sea situated within the limits prescribed by the Treaty. The Committee herewith report a bill making necessary amendments of the existing law relating to these subjects, and recommend its passage.

It then proceeds to describe the amendments, as declaring the true intent and meaning of section 1956. That, the Tribunal will remember, is the section which prohibits the killing of any otter, mink, marten, sable, or fur-seal or other fur-bearing animal within the limits of Alaska territory or in the waters thereof:

That section 1956 was intended to include and apply, and is hereby declared to include and apply, to *all the waters of Behring Sea in Alaska embraced within the boundary-lines mentioned and described in the Treaty with Russia*, dated the 30th March, A. D. 1867, by which the Territory of Alaska was ceded to the United States; and it shall be the duty of the President at a timely season in each year to issue his Proclamation, and cause the same to be published for one month in at least one newspaper published at each United States port of entry on the Pacific coast, warning all persons against entering said Territory and waters for the purpose of violating the provisions of said section; and he shall also cause one or more vessels of the United States to diligently cruize said waters and arrest all persons, and seize all vessels found to be, or to have been, engaged in any violation of the laws of the United States therein.

The Bill, Mr. President, did not pass the House of Representatives, but this section was added by the House as an amendment to a Bill for the protection of the salmon fisheries of Alaska, which originated in the Senate.

The Senate however refused to accept the amendment of the other House, and the Bill was accordingly referred to a Conference of the Houses, and the section, as finally modified and adopted in the Act of the 2nd March 1889, reads as follows:

This is as it stands in the book at page 99, and it will be observed that it did not pass the legislative bodies and ultimately become law in the terms in which it was recommended: those terms being that it should apply "to all the waters of Behring Sea in Alaska embraced within the boundary-lines mentioned and described in the Treaty with Russia". The earlier statute runs thus: "The laws... are extended to and over all the main-land, islands and waters of the territory ceded to the United States by the Treaty with Russia"; and the section as it was actually passed runs as follows:

That S. 1956... is hereby declared to include and apply to all the dominion of the United States in the waters of Behring Sea.

Now I really have to ask, what was the reason of the change? Was it intended that the change should mean anything, or was it intended that it should mean nothing?

Was it intended to be left in a position in which, without asserting dominion over all the waters of Behring Sea, it should yet be so vaguely framed that the executive authority would be entitled to invoke an interpretation of it as if it included all the waters of the Behring Sea as part of the dominion belonging to Alaska territory? In this discussion also one of your Tribunal took part, and, as the Tribunal would be prepared to expect, a sensible part. First of all, instead of being a substantive Act dealing with this question, it is smuggled into (if I may use the expression) an Act dealing with an entirely different matter—an Act for the protection of the Salmon Fisheries of Alaska; and when it came up, Mr. Senator Morgan (I now refer to page 249 of vol. III of the Appendix to the Case of Great Britain) says:

I wish to say just this: That in the Report made by the Committee the rights of the Government of the United States were not considered, and not intended to be

considered. We only arrive at the conclusion that the question presented in the amendment of the House is of such a serious and important a character that the Committee on Foreign Relations would not undertake at this time to pronounce that kind of judgment upon it which is due to the magnitude of such a question.

Very wise words.

I desire that the Bill as it passed the Senate originally should pass,

That is the Salmon Fisheries Bill.

because it protects the salmon and other fisheries in Alaska, about which there is no dispute; but this particular question is one of very great gravity and seriousness, and the Committee on Foreign Relations, or at least a majority of the entire Committee, did not feel warranted in undertaking to consider it at this time.

Mr. Justice HARLAN.—I think those observations of Mr. Sherman following that are important.

Sir CHARLES RUSSELL.—I will read them by all means.

Senator MORGAN.—I should like to say this, that we were then in full course of negotiations with Great Britain for the settlement of these disputed questions, and it was submitted by the Committee of Foreign Relations to the Senate that that diplomatic effort should not be obstructed by summary legislation.

Sir CHARLES RUSSELL.—I think nobody can doubt the perfect wisdom of that view which operated upon your mind, but it did not operate apparently upon that of the majority of the legislative body.

The point is not what individual Senators, however wise and eminent, held in the matter, but what the Legislature has done; and that I am now proceeding to consider. But in answer to Mr. Justice Harlan, I will of course, read, Mr. Sherman's speech.

General FOSTER.—He was chairman of the Committee.

Sir CHARLES RUSSELL.—I am much obliged.

I intended, when the amendment was properly before us, to say to the Senate that the Committee on Foreign Relations were of the opinion that while there was no objection at all to the Senate Bill as it passed [that is the Salmon Fisheries Bill] it being for a clear and plain purpose, the question proposed by the House in the form of an amendment was a grave one, and had no relation to the subject-
827 matter of the Bill, and ought not to be connected with it, had no connection really with it, and involved serious matters of international law, perhaps, and of public policy, and therefore it ought to be considered by itself.

I was directed by the Committee to state that the subject-matter, the merits of the proposition proposed by the House, were not before us, and not considered by us, and we are not at all committed for or against the proposition made by the House. We make this Report simply because it has no connection with the Bill itself, and it ought to be disagreed to and abandoned, and considered more carefully hereafter. I, therefore, ask for a Committee of Conference on the disagreeing votes of the two Houses.

Ultimately it was passed in the form in which it stands on page 99.

"That section 1956 of the Revised Statutes of the United States is hereby declared to include and apply to all the dominion of the United States in the waters of Behring Sea, and it shall be the duty of the President, at a timely season in each year, to issue his Proclamation, and cause the same to be published."

Senator MORGAN.—The word "dominion" used in that statute, I beg leave to say, Sir Charles, is the word used in the Treaty. Of course its signification as that statute has presented it must, in the absence of an interpretation by the Legislature, depend on the judgment of the courts as to what dominion included.

Sir CHARLES RUSSELL.—I do not know whether the Tribunal heard that. It is not without some consequence perhaps. The learned Senator has said that that word "dominion" as introduced in that section

is so introduced because it is found in the Treaty of 1867. I beg leave to observe, with great deference to the learned Senator, that when I come to deal with that Treaty of 1867 it will be found that there is no such word in it as "dominion", that it has been changed in the translation, and that "rights of sovereignty," which is the expression in the treaty, has been incorrectly interpreted in the English version into the word "dominion."

Senator MORGAN.—I never heard that, as to the word "dominion", there was a mistranslation of the treaty. I understand the Treaty was drawn up in English and French.

Sir CHARLES RUSSELL.—I think not, sir, with great deference.

Mr. Justice HARLAN.—Yes. Here it is in French on page 76.

Mr. FOSTER.—It is in English and in French. The United States Government never makes a Treaty in a foreign language.

Senator MORGAN.—The word "dominion" was used.

Sir CHARLES RUSSELL.—In my judgment the point is not a material one, but as matter of fact when I come to deal with that Treaty I will point out the construction that is erroneously placed upon some words in that Treaty, judged at least by the French original. I do not myself consider that the word is one of importance. It is a mere matter of translation.

My point upon this Statute of 1885, of course, is that it is a piece of *ex post facto* legislation, which purports to extend the operation of the earlier Acts. It is declaratory of the meaning of those earlier
828 Acts, but it substitutes words much wider in their scope and capable of being interpreted to mean, and I think what I have read shows they were intended to mean, the assertion of dominion, of territorial sovereignty, over the waters of Behring Sea within the limits of the Treaty of cession of 1867; therefore, the particular question to which Senator Morgan has been good enough to draw my attention would not in that connection be material.

So much for the statutes. Now still pursuing the same line to which I am closely adhering, and demonstrating to this Tribunal that as against British subjects the municipal law alone was invoked and put into operation, I have to say that there was no suggestion at any place, or at any time, or by any person, of that which one would have expected, if such a case had been in the minds of the Executive, and which must have been put forward in the simplest form thus: We are proceeding against your subjects for violation not of our municipal law, but merely in pursuance of that inherent right which we have to protect our property and our interests, wherever that property or those interests may be injuriously affected.

Now I wish to make this matter clear beyond all possibility of doubt; and one therefore naturally turns to see what were the grounds upon which those representing the United States Executive invoked the authority of their municipal courts and claimed sentence of imprisonment, fine and confiscation. For that purpose, of course, one naturally turns to the pleadings in the case.

PROCEEDINGS IN THE ALASKAN COURT.

The case is presented to the Court, and it must be dealt with by the Court *secundum allegata et probata.* Accordingly I turn to page 65 of Volume III of the Appendix to the British Case. On that page will be found the libel:

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF ALASKA.

The United States, Libellant, v. The Schooner "Thornton", her Tackle, etc.—On Libel of Information for being engaged in the Business of killing Fur-seal in Alaska.

TRANSCRIPT OF RECORD.

On the 28th day of August, 1886, was filed the following Libel of Information:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.
AUGUST SPECIAL TERM, 1886.

To the Honourable LAFAYETTE DAWSON, *Judge of said District Court:*

The libel of information of M. D. Ball, Attorney for the United States for the District of Alaska, who prosecutes on behalf of said United States, and being present here in Court in his proper person, in the name and on behalf of the said United States, against the schooner "Thornton", her tackle, apparel, boats, cargo
829 and furniture, and against all persons intervening for their interests therein, in a cause of forfeiture, alleges and informs as follows:

That Charles A. Abbey, an officer in the Revenue Marine Service of the United States, and on special duty in the waters of the district of Alaska, heretofore, to wit, on the 1st day of August, 1886, within the limits of Alaska territory, and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring Sea belonging to the said district, on waters navigable from the sea by vessels of 10 or more tons burden, seized the ship or vessel, commonly called a schooner, the "Thornton", her tackle, apparel, boats, cargo, and furniture, being the property of some person or persons to the said Attorney unknown, as forfeited to the United States, for the following causes:

That the said vessel or schooner was found engaged in killing fur-seal within the limits of Alaska Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States.

And the said Attorney saith that all and singular the premises are and were true, and within the Admiralty and maritime jurisdiction of this Court, and that by reason thereof, and by force of the Statutes of the United States in such cases made and provided, the afore-mentioned and described schooner or vessel, being a vessel of over 20 tons burden, her tackle, apparel, boats, cargo, and furniture, became and are forfeited to the use of the said United States, and that said schooner is now within the district aforesaid.

Wherefore the said Attorney prays that the usual process and monition of this honourable Court issue in this behalf, and that all persons interested in the before-mentioned and described schooner or vessel may be cited in general and special to answer the premises, and all due proceedings being had, that the said schooner or vessel, her tackle, apparel, boats, cargo, and furniture may, for the cause aforesaid, and others appearing, be condemned by the definite sentence and decree of this honourable Court, as forfeited to the use of the said United States, according to the form of the Statute of the said United States in such cases made and provided.

M. D. BALL,
United States District Attorney for the District of Alaska.

That libel was amended and appears in its amended form on page 71, at the bottom of the page. It is not amended in any matter material for this purpose, except so as to bring the men as persons under the cognizance of the court. They were afterwards subjected, as you know, to fine and imprisonment; which has also an important bearing as to whether it was under municipal law or not that these proceedings were founded.

Then there is a demurrer, at the bottom of page 72:

1. The said claimant by protestation, not confessing all or any of the matters in said amended information contained to be true, demurs thereto and says that the said matters in manner and form, as the same are in the information stated and set forth, are not sufficient in law for the United States to have and maintain their said action for the forfeiture of the property aforesaid.

2. The said claimant by protestation denies that this Court has jurisdiction to determine or try the question hereby put in issue.

3. And that the said claimant is not bound in law to answer the same.

That demurrer was overruled. I do not think I need trouble you with it.

Senator MORGAN.—Was there an intervention of the owner in that case?

830 Sir CHARLES RUSSELL.—Yes, of the owner or the person interested; I think the owner. I wish to go over all these, so that I need not have to recur again to the pleadings in the other cases. I am merely giving the "Thornton" as a sample case in 1886. The others were similar.

I will now turn to page 112 of that large volume, which relates to the later seizures.

The PRESIDENT.—Your point is that the prosecution was always had under section 1956?

Sir CHARLES RUSSELL.—Yes, sir. I find I ought to refer the Tribunal for one moment to the beginning of the proceedings in the "Sayward" case, as they were similar to the later prosecutions. It is on page 83, at the bottom of the page, vol. III.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

United States v. Geo. R. Ferry and A. Laing.—Information.

DISTRICT OF ALASKA, *ss.*

George R. Ferry and A. Laing are accused by M. D. Ball, United States District Attorney for Alaska, by this information, of the crime of killing fur seals within the waters of Alaska Territory, committed as follows:

The said George R. Ferry and A. Laing on the 8th day of July, A. D. 1887, in the District of Alaska and within the jurisdiction of this Court, to wit, in Behring's Sea, within the waters of Alaska Territory, did kill ten fur seals, contrary to the Statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Dated at Sitka the 23rd day of July, 1887.

I need not trouble you with the pleadings, which were based upon the same line; but I now proceed to show the grounds upon which the judgment of condemnation of the court was invoked, and that will be found at page 112, these being the grounds filed in the Court, and presented as the case of the United States, upon which the demand for judgment was based. It appears that we have got these proceedings from *The New-York Herald* of October 18, 1887. You will see at the bottom of page 112 a not unimportant statement. *The New-York Herald* is an important paper published, as you know, in New-York, and indeed I may say in Paris also:

The Government here are in receipt of advices from Sitka, which contain the brief which is understood to have been prepared at Washington and recently filed in the Court at Sitka by Mr. A. K. Delaney, as counsel for the United States Government.

Therefore it was under high auspices.

Mr. FOSTER.—That is a despatch from Ottawa, published in the *Herald*.

Sir CHARLES RUSSELL.—There is no doubt about the fact, but if my friend intimates to me that he has any doubt about the fact I will pursue the evidence that shows it.

Mr. FOSTER.—I am simply calling attention to the fact that the despatch originates from Ottawa, Canada.

831 Sir CHARLES RUSSELL.—It does not matter very much where it originates.

The PRESIDENT.—You mean, as a matter of fact, that the pleading was prepared at Washington?

Sir CHARLES RUSSELL.—Precisely. Mr. President I would ask you to kindly allow my friend Sir Richard Webster to read the whole of this, as it is one of the few documents I shall desire to read *in extenso.*

Senator MORGAN.—Is that a brief in the case?

Sir CHARLES RUSSELL.—Yes; it is the formal pleading filed at Sitka on behalf of the United States.

Senator MORGAN.—It is not a brief then; it is a part of the case?

Sir RICHARD WEBSTER.—In the pleadings in those Courts both sides file a brief in the Court itself; it is not the same thing as a brief of counsel.

Sir RICHARD WEBSTER thereupon read to the Court the following verbatim copy of the brief:

Case.

The information in this case is based on Section 1956 of Chapter 3 of the Revised Statutes of the United States, which provides that "No person shall kill any otter, mink, marten, sable or fur-seal, or other fur-bearing animal within the limits of Alaska Territory or in the waters thereof."

The offence is charged to have been committed 130 miles north of the Island of Ounalaska, and therefore in the main waters of that part of Behring's Sea ceded by Russia to the United States by the Treaty of 1867. The defendants demur to the information on the ground.

1. That the Court has no jurisdiction over the defendants, the alleged offence having been committed beyond the limit of a marine league from the shores of Alaska.

2. That the Act under which the defendants were arrested is unconstitutional in so far as it restricts the free navigation of the Behring's Sea for fishing and sealing purposes beyond the limits of a marine league from shore. The issue thus raised by the demurrer presents squarely the questions:

(1) The jurisdiction of the United States over Behring's Sea.

(2) The power of Congress to legislate concerning those waters.

The argument.

The fate of the second of these propositions depends largely upon that of the first, for if the jurisdiction and dominion of the United States as to these waters be not sustained the restrictive Acts of Congress must fall, and if our jurisdiction shall be sustained small question can be made as to the power of Congress to regulate fishing and sealing within our own waters. The grave question, one important to all the nations of the civilized world, as well as to the United States and Great Britain, is "the dominion of Behring's Sea."

The Three Mile Limit.

Concerning the doctrine of international law establishing what is known as the marine league belt, which extends the jurisdiction of a nation into adjacent seas for the distance of 1 marine league, or 3 miles from its shores, and following all the indentations and sinuosities of its coast, there is at this day no room for discussion. It must be accepted as the settled law of nations. It is sustained by the highest authorities, law-writers, and jurists. It has been sanctioned by the
832 United States since the foundation of the Government. It was affirmed by Mr. Jefferson, Secretary of State, as early as 1793, and has been reaffirmed by his successors—Mr. Pickering, in 1796; Mr. Madison, in 1807; Mr. Webster, in 1842; Mr. Buchanan, in 1849; Mr. Seward, in 1862, 1863, and 1864; Mr. Fish, in 1875; Mr. Evarts, in 1879 and 1881; and Mr. Bayard, in 1886. (Wheaton's International Law, vol. I, sec. 32, pp. 100 and 109.)

Sanctioned thus by an unbroken line of precedents covering the first century of our national existence, the United States would not abandon this doctrine if they could; they could not if they would.

Landlocked Seas.

Well grounded as is this doctrine of the law of nations, it is no more firmly established as a part of the international code than that other principle which gives to a nation supremacy, jurisdiction, dominion over its own inland waters, gulfs, bays, and seas. If a sea is entirely enclosed by the territories of a nation, and has no other communication with the ocean than by a channel, of which that nation may take

possession, it appears that such a sea is no less capable of being occupied and becoming property than the land, and it ought to follow the fate of the country that surrounds it. The Mediterranean in former times was absolutely inclosed within the territories of the Romans, and that people, by rendering themselves masters of the strait which joins it to the ocean might subject the Mediterranean to their Empire, and assume the dominion over it. They did not by such proceeding injure the rights of other nations, a particular sea being manifestly designed by nature for the use of the countries and nations that surround it. (Vattel's Law of Nations, pp. 129 and 130.)

Chancellor Kent, in 1826 before the doctrine as to the marine league limit was as firmly established as it now is, says:

"It is difficult to draw any precise or determined conclusion amid the variety of opinions as to the distance a State may lawfully extend its exclusive dominion over the seas adjoining its territories and beyond those portions of the sea which are embraced by harbours, gulfs, bays, and estuaries, and over which its jurisdiction unquestionably extends." (Kent, vol. I, p. 28.)

Jurisdiction of States.

It thus appears that, while in 1826 the limit of the marine belt was unsettled, the jurisdiction of a state over its inland waters was unquestioned.

"In the laws of nations bays are regarded as a part of the territory of the country when their dimensions and configurations are such as to show that the nation occupying the coast also occupies the bay as a part of its territory." (Manning's Law of Nations, p. 120.)

"An inland sea or lake belongs to the state in which it is territorially situated. As illustrations, may be mentioned the inland lakes whose entire body is within the United States, and the Sea of Azof." (Wheaton's International Law, vol. I, sec. 31.)

"Rivers and inland lakes and seas, when contained in a particular State, are subject to the Sovereign of such State." (Idem, vol. III, sec. 300.)

"Undoubtedly it is upon this principle of international law that our right to dominion over such vast inland waters as the Great Lakes, Boston Harbor, Long Island Sound, Delaware and Chesapeake Bays, Albemarle Sound, and the Bay of San Francisco rests. This country, in 1793, considered the whole of Delaware Bay to be within our territorial jurisdiction, and it rested its claim upon these authorities, which admit that gulfs, channels, and arms of the sea belong to the people within whose land they are encompassed." (Kent's Com. vol. I, p. 528.)

The Doctrine Always Asserted.

It thus appears that our Government asserted this doctrine in its infancy. It was announced by Mr. Jefferson as Secretary of State, and by the Attorney General in 1793. Mr. Pickering, Secretary of State in 1796, reaffirms it, in his letter to the
833 Governor of Virginia, in the following language: "Our jurisdiction has been fixed to extend 3 geographical miles from our shores, with the exception of any waters or bays which are so land-locked as to be unquestionably within the jurisdiction of the states, be their extent what they may." (Wheaton's International Law, vol. I, sec. 32, pp. 2–100.)

Mr. Buchanan, Secretary of State to Mr. Jordan, in 1849 reiterates this rule in the following language: "The exclusive jurisdiction of a nation extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea enclosed by head lands." (Idem p. 101.)

Mr. Seward, in the Senate in 1852, substantially enunciates the same doctrine by declaring that if we relied alone upon the old rule that only those bays whose entrance from headland to headland do not exceed six miles are within the territorial jurisdiction of the adjoining nation, our dominion to all the larger and more important arms of the sea on both our Atlantic and Pacific Coasts would have to be surrendered. Our right to jurisdiction over these rests with the rule of international law which gives a nation jurisdiction over waters embraced within its land dominion.

Behring's Sea Inland Water.

It thus appears that from our earliest history, contemporaneously with our acceptance of the principle of the marine league belt, and supported by the same high authorities is the assertion of the doctrine of our right to dominion over our inland waters under the Treaty of 1867, and on this rule of international law we base our claim to jurisdiction and dominion over the waters of the Behring Sea. While it is, no doubt, true that a nation cannot by treaty acquire dominion in contravention of the law of nations, it is none the less true that, whatever title or dominion our grantor, Russia, possessed under the law of nations at the time of the treaty of ces-

sion in 1867, passed and now rightfully belongs to the United States. Having determined the law, we are next led to inquire as to whether Behring's Sea is an inland water or a part of the open ocean, and what was Russia's jurisdiction over it.

Behring's Sea is an inland water. Beginning on the eastern coast of Asia, this body of water, formerly known as the Sea of Kamchatka, is bounded by the Peninsula of Kamchatka and Eastern Siberia to the Behring's Strait. From the American side of this strait the waters of the Behring's Sea wash the coast of the mainland of Alaska as far south as the Peninsula of Alaska. From the extremity of this peninsula, in a long, sweeping curve, the Aleutian Islands stretch in a continuous chain almost to the shores of Kamchatka, thus encasing the sea.

Russia's Title and Dominion.

It will not be denied that at the time the United States acquired the Territory of Alaska by the Treaty of 1867, the waters of the Behring's Sea washed only the shores of Russian territory. The territory on the Asiatic side she had possessed "since the memory of man runneth not to the contrary." Her title to the other portions of those shores and her dominion over the waters of the Behring's Sea are based "on discovery and settlement."

Possession and Supremacy.

The right of a nation to acquire new territory by discovery and possession has been so universally recognized by the law of nations that a citation of authorities is scarcely necessary. Upon this subject the most eminent as well as the most conservative of authorities says: "All mankind have an equal right to things that have not yet fallen into the possession of any one, and those things belong to the person who first takes possession of them. When, therefore, a nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has sufficiently made known its will in this respect it cannot be deprived of it by another nation."

"Thus navigators going on voyages of discovery, furnished with a commission from their Sovereign, meeting islands or other lands in a desert state, have taken
834 possession of them in the name of their nation, and this title has been usually respected, provided it was soon followed by a real possession." "When a nation takes possession of a country to which no prior owner can lay claim, it is considered as acquiring the empire or sovereignty of it at the same time with the domain." "The whole space over which a nation extends its government becomes the seat of its jurisdiction and is called its territory." (Vattel, p. 98.)

Such being the law, we are led to inquire as to on what discoveries, possessions, and occupation Russia's right to dominion in North America is based.

Historical Sketch—1725–1867.

In 1725, under the commission of that wondrous combination of iron and energy, Peter the Great, an expedition was organized, crossed the continent from St. Petersburg to Kamchatka, where a vessel was constructed, and in July 1728 sailed for explorations to the north and east. That vessel was the "Gabriel". Her master was Vitus Behring, a name destined to historical immortality. On the expedition Behring crossed the waters of the Sea of Kamchatka, discovered and named the Island St. Lawrence midway between which and the Asiatic mainland our boundary-line is laid down by the Treaty, and after passing through the straits which bear his name returned to St. Petersburg.

In 1733 a second expedition was organized under the auspices of the Government and the commission of Queen Anne, and with Behring, raised to the rank of Admiral, at its head, repeated the long and dreary journey across Siberia, and in June, 1741, sailed for new discoveries. In July of that year Behring sighted the American continent, some authorities claim at the 58th degree of north latitude, others at the 50th degree. The latter is probably correct, as it rests on the authority of Stellar, who accompanied the expedition, and Behring undoubtedly sailed as far south along the American coast as the 45th parallel, in accordance with his instructions. But what is more pertinent to this inquiry, he discovered several of the Aleutian Islands and the Komanderoff group or couplet. On the larger of this couplet, which bears his name, the hardy navigator, after shipwreck, died on the 19th of December, 1741.

Russian Discovery.

But the spirit of Russian discovery survived him, and from the starting point he began traders, hunters, and adventurers made their way from island to island until the whole Aleutian Chain, and with it the mainland, was discovered. In 1743, 1745, 1747, and 1749 a Cossack sergeant named Bossof made four consecutive voyages from

the mainland of Kamchatka to the Behring and Copper Islands in vessels of his own construction. In 1745 a sailor named Nevidchinof, who had served under Behring, crossed the channel which connects the North Pacific Ocean with the Behring Sea and discovered the islands of Attu, and Agatoo, the former of which now marks the western limit of our land dominion. In 1744 a small Russian merchant vessel reached the island of Atka and some of the smaller islands surrounding it.

Ten years later Glottoff, in a ship belonging to an Okotsk merchant, advanced as far as the island of Ounak, and subsequently discovered Ounalaska and the whole of that group of the Aleutian Chain known as the Fox Islands. He made a map of his explorations, which includes eight islands east of Ounalaska. In 1760 a Russian merchant, Adreian Tolstyk, landed on the island of Adak, explored it and some of the surrounding islands, and made a report of his discoveries to the Russian Crown. This group was named after him, the Adreian Islands. The next year a ship belonging to a Russian merchant named Bechevin made the coast of the Alaska Peninsula, and in the autumn of 1762 Glottoff, who discovered Ounalaska and the Fox group, reached the island of Kodiak. In 1768 two captains of the Imperial Navy, Krenitzen and Leveshoff, sailed from Kamchatka in two Government vessels, and the former passed the succeeding winter at Kodiak, and the latter at Ounalaska.

835 Twenty-five years succeeding the death of Behring the spirit of discovery had planted the Russian ensign along the entire Aleutian Chain from Behring's Island to the mainland of the North American Continent.

After the Seals.

Possession and occupation followed the foot-steps of discovery, and settlements and trading posts were established at the more favorable points along the line. Expedition stimulated by the large remunerations of the fur traffic, were constantly fitted out at the ports along the shores of the Sea of Okotsk and the mouth of the Amoor river for voyages of trade and exploration in the new country. Lieut. Elliott, in his report on the seal islands, published with the 10th Census of the United States, estimates that no fewer than 25 companies with quite a fleet of small vessels were thus employed as early as 1772. Under the auspices of one of these companies, Shelekoff, a merchant of Rylsk, founded the first permanent settlement on the island of Kodiak in 1784. From this point exploring expeditions were sent out, one of which crossed the Strait between Kodiak and the mainland which bears Shelekoff's name, and explored the coast of the mainland as far as Cook's Inlet, upon the shores of which in 1786 a settlement was established.

Another pushed along the coast to Prince William Sound and Cape St. Elias, the latter of which was located by Behring in 1741. In 1788 another of Shelekoff's ships visited Prince William's Sound, discovered Yakutat Bay, and made a thorough exploration of Cook's Inlet. In the meantime, in 1786, Gehrman Pribilof, a Muscovite ship's mate, sailed from Ounalaska in a small sloop called the "St. George" discovered the islands which bear his name, located in the heart of the Behring Sea, and now far famed as the only seal rookeries in the known world.

Baranoff's Mission.

In 1790 the Shelekoff company placed at the head of all enterprises in the new country that restless spirit whose energy clinched Russia's dominion to her possessions in North America, Alexander Baranoff. Arriving at Kodiak, he changed the headquarters of the company to the harbor of St. Paul, where the village of that name now stands, and the next year one of his skippers passed round the extremity of the Alaska Peninsula and along the Northwestern coast to Bristol Bay, discovering Kvichak river and the Lake Llamna, and crossed the portage to the mouth of Cook's Inlet, thus finding the safest and quickest means of communication between Shelekoff's Straits and the Behring Sea.

In 1794 Baranoff established a ship yard at Resurrection Bay on Prince William Sound. About this time the first missionaries of the Greek church arrived, and Missions were established at Kodiak, Ounalaska and Spruce Island. The next year Baranoff extended his operations and trading posts to Yakutat Bay. Following this was the consolidation of all Russian interests in North America, giving rise to the Russian-American Company, which was chartered the year that Baranoff founded Sitka, 1799. The possessions and supremacy Russia gained under this Corporation have been so universally acknowledged and widely understood as to scarcely need comment. Under this Company, chartered by the Crown, patronized by nobility, sustained by the sinews of consolidated capital, and led by the tireless energy of Baranoff, new explorations and settlements inevitably followed.

As early as 1806, aside from trading posts and Settlements along the Aleutian Islands, we find the Russian-American Company had established fourteen fortified

stations from Kodiak to the Alexander Archipelago, now known as Southeastern Alaska—one at Three Saints Harbour, one at St. Paul Island, one on the island of Kodiak, one off Afognak Island, one at the entrance of Cook's Inlet, three on the coast of the inlet, two on Prince William Sound, one at Cape St. Elias, two on Kautat Bay, and one at New Archangel, on the Bay of Sitka.

836 *Along the Coast.*

After the death of Baranoff, in 1819, his successor in charge of the affairs of the Company, Lieutenant Yanovsky, made extensive explorations of the coast and mainland above the Alaska Peninsula. One expedition explored and made a preliminary survey of the coast from Bristol Bay as far as the mouth of the Kuskovim River, discovering and locating that stream and also the Island of Nunivak, on parallel 60th degree, in Behring's Sea. Another passed beyond the mouth of the Yukon to Norton's Sound, and another entered the Nushegak River just above Bristol Bay, pushed into the interior, and crossed the mountains and tundras into the valley of the Kuskovim. Following these, in 1824 and 1826, were the explorations and surveys of Etholin and Luedke, further north on the coast of the mainland.

In 1824 that eminent divine of the Greek Church, Bishop Veniaminoff, visited the coast between Bristol Bay and the Kuskovim, establishing missions, chapels, and churches. Previous to this time, in 1815, Lieutenant Kotzebue, under the patronage of Count Rumiantzo, had discovered and surveyed Kotzebue Sound and the Arctic coast of America as far as Cape Lisburne. Lieutenant Tebenkof, of the navy, in 1835, established missions and redoubts at St. Michael's, on the Norton Sound, and in 1838, an expedition fitted out by him located Point Barrow. Meanwhile, expeditions had penetrated into the interior. Glazunof ascended the Yukon as far as Nulato, and made the first portage between that river and the Kuskovim in 1836, while Malakof reached the same point from the redoubt established by Veniaminoff on the Nushegak, by way of that river and the Kuskovim.

They were followed by Lieutenant Zagoskin, of the Imperial Navy, who in 1842-3 with five assistants made extensive explorations of basins of the Yukon and Kuskovim, a voluminous journal of which is now in print.

Unbroken Possession.

This brings us to the close of the first century of Russian discoveries and occupation in North America. It is needless to follow further, as the twenty-five years intervening between 1842 and the date of the treaty of the United States are but a continuation and repetition of Russian occupation and supremacy of this territory. That possession was never changed or broken until it passed to the United States under the Treaty of 1867. The archives of Russia will further show that the Imperial Government itself not only fostered these discoveries, but from the earliest period has asserted and exercised dominion over the North American possessions.

The discoveries of Behring in 1728-1741 were under Royal Commission. In 1766 Tolstyk, after his discovery of the Adreian group of the Aleutian chain, was granted special privileges in the new possessions by an Edict of Catherine II. The expedition of Kreutzen, of the Imperial Navy, to Ounimak Island in 1758 was under commission of the same Sovereign. Upon the Report of the Committee of Commerce and the recommendation of the Governor-General of Siberia in 1768, Shelikof was granted a credit from the Public Treasury of 200,000 roubles to carry forward his enterprises in North America. By a Ukase of Catherine II in 1793 Missions of the Greek Church were established in the new dominion, and a Colony was also founded in Kodiak under Royal Edict.

The Russian American Company.

The Charter of the Russian American Company issued in 1799 declares Russia's dominion in the following language: "By the right of discovery in past times by Russian navigators of the Northwestern part of America, beginning from the 55th degree of North latitude and the chain of islands extending from Kamchatka to America and Southward to Japan, graciously permit the Company to have the use of all hunting grounds and establishments now existing on the Northwestern
837 coasts of America, from the above-mentioned 55th degree to Bering Strait, and on the same on the Aleutian Kurile Islands situated on the Northeastern Ocean."

In conclusion, the Charter enjoins: "All military and civil authorities in the above mentioned localities not only not to prevent the company from enjoying to the fullest extent the privileges granted but in case of need to protect them with all their power from loss or injury, and render them, upon application of the company, all aid, assistance and protection."

This assertation of dominion by Russia was reiterated in 1820, when, by an Imperial Ukase, Alexander I granted the second charter to the Russian American Company, renewing its privileges for twenty years, and was again asserted in 1844 by the granting of the third charter, which not only increased the privileges of the company, but also provided a system of colonial government for the Russian American colonies for the twenty succeeding years.

Russian Ordinance of 1821.

All these assertions of jurisdiction and dominion passed unchallenged, but in 1821 the Imperial Government had issued an ordinance regulating traffic in its Asiatic and American possessions, and reserved exclusively to subjects of the Russian empire "the transaction of commerce, the pursuit of whaling and fishing, or any other industry, on the islands, in the harbors and inlets, and in general along the Northwestern coast of America, from Behring Strait to the 51st Parallel of North Latitude, and in the Aleutian Islands, and along the coast of Siberia and on the Kurile Islands from Behring Strait to the Southeastern promontory of the Island of Urup—viz, as far south as latitude 45 degrees and 50 degrees North".

This Ordinance called forth the protests of the United States and Great Britain, and protracted discussions followed. A critical examination of the diplomatic correspondence between the United States and Great Britain on one side and Russia upon the other will disclose that the points in dispute in the controversy were the assertions of Russia to exclusive jurisdiction over the Pacific Ocean, the assertion of dominion over the coast of North America from the 55th parallel south to the 51st. (See note of Mr. Adams, American Minister to Russia, to the Russian Minister March 1822.)

Following these discussions came the Treaty of 1824, between Russia and the United States, and the analogous Treaty of 1825 between Russia and Great Britain. By these Treaties Russia receded from her assertion of exclusive jurisdiction over the Pacific Ocean, and abandoned her claim to possessions on the coast of North America, south of 54° 40′.

The Treaty.

The following are the Articles of the Treaty between the United States and Russia germane to the questions involved in the case:

ARTICLE I.

"It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the High Contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts upon points which may not already have been occupied for the purpose of trading with the natives saving always the restrictions and conditions determined by the following Articles."

ARTICLE II.

With a view of preventing the rights of navigation and of fishing exercised upon the Great Ocean by the citizens and subjects of the High Contracting Powers from becoming the pretext of an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian establishment without the permission of the Governor or Commander, and that reciprocally the sub-
838 jects of Russia shall not resort without permission to any establishment of the United States upon the north-west coast.

ARTICLE III.

It is, moreover, agreed that hereafter there shall not be formed by the citizens of the United States, or under authority of the said States, any establishment upon the north-west coast of America, nor in any of the islands adjacent to the north of 54° 40′ north latitude, and that in the same manner there shall be none formed by the Russia subjects, or under the authority of Russia, south of the same parallel.

ARTICLE IV.

It is, nevertheless, understood that during a term of ten years, counting from the signature of the present Convention, the ships of both Powers, or which belong to their citizens or subjects respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors, and creeks upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country. (Wheaton's International Law, vol. I, pp. 2-112.)

The Treaty between Russia and Great Britain contains substantially the same provisions. Neither in the Treaties nor in the correspondence, is any reference made to Russia's claim of dominion over the Behring Sea. If in the diplomatic correspondence leading up to the Treaty any challenge as to the jurisdiction of Behring Sea had been made, why was it not settled by the Treaties? Did the High Contracting Powers to these Treaties enter into a discussion lasting nearly two years as to one matter and make adjustment by Treaty as to other matters?

The Convention between Russia and Great Britain aside from disposing of the question of Russia's asserted sovereignty over the Pacific Ocean and fixing the Southern limit of her possession on the western coast of North America, also established the dividing line of their respective North American possessions from 54.40 north to the frozen ocean, which boundary-line is incorporated *verbatim* into the Treaty of Cession of 1867 from Russia to the United States. (Treaty of 1867, Article I.)

If differences existed as to the dominion of the Behring's Sea, why were they not also settled, as that manifestly would be a part of the object of holding the Convention?

Russia's jurisdiction.

It cannot be successfully maintained that by such terms as the "Great Ocean" the "Pacific Ocean" or the "South Sea", the High Contracting Powers referred to the Behring's Sea. Aside from this, it is stipulated in both Treaties that the ships, citizens, and subjects of either Powers may reciprocally frequent the interior seas, gulfs, harbours, and creeks of the other on the North American coast for a period of ten years. The only interior sea on the North American Coast was the Behring's Sea held by Russia. If that was a part of the "Pacific Ocean", or the "Great Ocean", or the "South Sea", or belonged to the high seas under the law of nations, why the term "interior sea" and why should the United States and Great Britain accept a ten years' limit of the right of navigation, fishing, and trading in an interior sea if they had the unconditional right to frequent those waters under the law of nations?

This section of the Treaty, therefore, really concedes Russia's dominion over Behring's Sea. Chancellor Kent alludes to this subject as the "claim of Russia to sovereignty over the Pacific Ocean north of the 51st degree of latitude". (Kent Vol. 1, p. 28.)

A summary of results following the discussions and Conventions as to the Royal Ordinance of 1821 is the abandonment by Russia of her claim to sovereignty over the Pacific Ocean; a surrender of her claim to the North American coast south of 54 degrees 40; a settlement by Russia and Great Britain as to the boundary-line of their possessions in North America; agreements as to settlements upon
839 each other's territory and navigation of each other's waters, but no surrender of Russia's jurisdiction over the Behring's Sea.

Powers of Congress.

Upon this branch of the subject, the power of Congress, over Behring's Sea, there seems to be little room for discussion. The power of a nation to control its own dominions is one of the inherent elements of sovereignty.

"When a nation takes possession of certain parts of the sea, it takes possession of the empire over them as well as of the domain on the same principles which are advanced in treating of the land. These parts of the sea are within the jurisdiction of the nation and a part of its territory; the Sovereign commands them; he makes laws and may punish those who violate them; in a word, he has the same rights there as on the land, and in general every right which the laws of the State allow him". (Vattel's "Law of Nations", p. 130.)

By the Treaty of 1867, "the cession of territory and dominion therein made is declared to be free and unencumbered by any reservations, privileges, franchises, grants or possessions..... and conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion and the appurtenances thereto". (Treaty Article 6.)

The Constitution of the United States declares that all Treaties made under the authority of the United States shall be the supreme law of the land. (Constitution of the United States, Article 6.)

That same instrument vests in Congress "the power to make all needful rules and regulations respecting the territory or other property belonging to the United States". (Constitution of the United States, Article 4 section 3.)

Manifestly, the Acts of Congress contained in chapter 3, Revised Statutes of the United States, "relating to the unorganized Territory of Alaska", and under which the information is brought, are embraced within these constitutional provisions.

Conclusion.

The foregoing record may contain but a meagre idea of the indomitable energy and perseverance displayed by the Russian people in acquiring empire in North America, beginning with discoveries of Behring in 1728, and extending for more than a century and a quarter, wherein they braved the perils of land and sea, overcame a savage native population, faced ice and snow, storm and shipwreck, to found and maintain empire on these rugged shores. Enough has been said to disclose the basis of Russia's right to jurisdiction of the Behring's Sea under the law of nations, viz., original possession of the Asiatic coast followed by discovery and possession of the Aleutian chain and the shores of Alaska north, not only to Behring's Strait but to Point Barrow and the frozen ocean, thus inclosing within its territory, as within the embrace of a mighty giant, the islands and waters of Behring's Sea, and with this the assertion and exercise of dominion over land and sea.

Such is our understanding of the law, such is the record. Upon them the United States are prepared to abide the Judgments of the Courts and the opinion of the civilized world.

Senator MORGAN.—Is there any dispute about that long and historical résumé found in that statement?

Sir CHARLES RUSSELL.—I do not think anything which would need criticism of it in any detail. I do not think it is historically correct in some particulars, but I do not think they are of sufficient importance to require notice.

Senator MORGAN.—Generally it is historically correct.

Sir CHARLES RUSSELL.—I should say so.

840 Mr. PHELPS.—Perhaps it is only fair to my learned friends to state that, upon any investigation we have been able to make, we have no reason to suppose that that case was prepared by anybody connected with the Government of the United States in Washington, or used in that case.

It is telegraphed from Ottawa, and that is the first and all that we know about it.

Sir CHARLES RUSSELL.—Then I must say this is the most extraordinary case of a forgery that the world has ever known.

Mr. PHELPS.—I do not mean to say that it was a forgery. It was not used in the case, so far as we have learned.

The Tribunal here adjourned for lunch.

The PRESIDENT.—Sir Charles, if you will continue your argument, we are ready to hear you.

Sir CHARLES RUSSELL.—Mr. President, I am not surprised, nor do I in the least complain, of the interposition of my friends at the point at which the discussion broke off. It is a very important point indeed to ascertain whether this is a genuine brief, and important also, although not so vitally important, to ascertain whether it was prepared at Washington. But whether it was prepared at Washington or whether it was prepared elsewhere, it was prepared by the Counsel who were put forward to represent the views and the contentions of the United States, and to formulate the grounds of fact and of law upon which those views were based, and by which they were to be defended.

Senator MORGAN.—Are the names of those counsel given, Sir Charles?

Sir CHARLES RUSSELL.—Yes: Mr. A. K. Delaney; and I will only say that it is obvious upon the face of the document itself that it was prepared not only by a man of considerable ability, but by a man who had devoted considerable research and thought to the subject, and one, moreover, who had access to official documents and records in the preparation of this "brief" to be laid before the Court; and certainly it is a very high testimony to the ability of the counsel in this rather out of the way place, if, without instructions from Washington, and

without having the materials for this argument put at his disposition from Washington, he was able to frame so exceedingly good a one. But I hardly think he could, without authority from "head-quarters", if I must use that expression, have ventured to speak in the way he has done of these contentions unless he was so authorised, for he concludes with these words:

Such is our understanding of the law, such is the record. Upon them the United States are prepared to abide the judgments of the Courts and the opinion of the civilized world.

Now I wish to put this Tribunal in full possession of how this brief has been introduced into our Case: how it has been drawn to the attention of the United States Counsel, and how they have
841 dealt, or rather failed to deal, with it. In the first instance it is introduced into the original Case of Great Britain. You will find it, Mr. President, at page 127.

The Counsel appearing for the United States Government, to justify the seizure of the "Anna Beck" and other vessels in 1889, filed a brief, from which the following extracts are taken.

Now in the margin you will see that we refer to the documents from which that is originally taken, namely the Blue Book—that is to say, the parliamentary Blue Book of Great Britain—and also to Appendix, vol. III—the large volume from which I have been reading it this morning.

But I am now in a position to inform you that we have actually in this building, at this moment, the gentleman who forwarded that very document to the "New York Herald". The "New York Herald", as I have said, and as you know, is a paper of some importance. It appears to be published in the "New York Herald", with the statement that it is understood to have been prepared in Washington—a statement never denied; and the gentleman is prepared to state—he will be put on any affirmation that the Court think desirable—that he received that as the brief prepared at Washington from the gentleman who represented the Government of the Queen watching the proceedings, who, in his turn, stated that he had received it from the Counsel engaged in the case; and therefore I think the chain of evidence is rather complete upon the point.

Senator MORGAN.—You mentioned a fact, Sir Charles, that I was not aware of before. You speak of the Counsel representing the Government of the Queen in these cases.

Sir CHARLES RUSSELL.—He was watching the proceedings.

Senator MORGAN.—In these cases?

Sir CHARLES RUSSELL.—So I have been informed.

Senator MORGAN.—In Alaska?

Sir CHARLES RUSSELL.—So I have been informed. But the matter does not stop there. I proceed to the next stage. I find this very document referred to in another place. I must trouble the Tribunal to refer for a moment to page 279 of vol. III of the Appendix to the British Case, and you will see the document headed Appendix, No. 2:

Extract from the Report of the Governor of Alaska for the Fiscal Year 1887. Protection of fur-seals:

In connection with these seizures, from which it seems to me no other inference can be drawn than that our Government is determined to assert and maintain the right of exclusive jurisdiction over all that portion of Behring's Sea ceded to it by Russia, I can only reiterate that part of my last Annual Report, in which I essayed, rather feebly I fear, not only to show the necessity of such a policy to the preservation of the sea-fur industry, but the wrong its abandonment would inflict upon the very considerable number of native people who wholly or in large part depend upon it for a livelihood, and whom, it appears to me, it is the duty of the Government to protect.

In view of the fact that the seizure of these vessels and their forfeiture has raised an international question of grave importance, I have thought it proper to include with this Report a copy of the brief submitted by the Queen's Counsel in
842 the case of the British schooners, together with the argument of the United States attorney and the opinion of the Court.

Honourable A. K. Delaney, Collector of Customs having been designated as special Counsel on account of the illness and subsequent death of Colonel M. D. Ball, United States District Attorney, represented the Government and made what I think will be generally conceded a most able and forcible, if not wholly unanswerable argument.

So that this gentleman making his Official Report as Governor of Alaska forwards also a copy of this document, and any difficulty or difference that arises between my friend and myself upon the complete authenticity and reliability of the "brief" we have cited, would of course at once be removed by the production of the document which the Governor of Alaska enclosed. If my friend can produce it, I think it will be found that the two documents are, *verbatim et literatim*, in agreement.

Senator MORGAN.—Sir Charles, I am not sufficiently familiar with the proceedings of the British or Canadian Tribunals, to ascertain without enquiry from you, what is meant there by the brief of "the Queen's Counsel".

Sir CHARLES RUSSELL.—It clearly means that he was the Counsel representing the case of the British owners of schooners.

Senator MORGAN.—That means Counsel appearing for the Government.

Sir CHARLES RUSSELL.—No; it means a Counsel who is a "Queen's Counsel", just as my friend is a "Queen's Counsel", and as I am.

Senator MORGAN.—It is the description of his position in the profession?

Sir CHARLES RUSSELL.—It is the description of the position in the profession of the Counsel in the case of the British schooners.

Now I am going to refer to that brief. The brief in answer to the case on the part of the United States is to be found in the same book—that large volume—page 100; and as I understand the procedure in the Court upon this point—I am speaking without certain knowledge upon it, and I should therefore be glad to be corrected, but I gather from what appears, and from other information, that the course is that stated by my learned friend Sir Richard Webster, namely, that the proceedings originate in a libel or summons, and that, after that, the counsel for the Libellant files his Brief, or what we should call in Great Britain "Statement of Claim"; that being filed, the other side files, in his turn, his "Brief", which is the answer which the Defendant puts forward to the Statement of Claim; and, accordingly, the Brief on behalf of the owners of the schooners, and filed in the Court, is set out at page 100 of that large volume. I am not going to trouble the Court to read it, but I wish to show that the person who prepared this brief had before him the Brief on the part of the Libellant, because he follows the various grounds, which he takes one by one—very much shorter—(as an answer generally speaking is shorter than the original allegation which is traversed)—very much shorter, but taking up all the points.

843 Senator MORGAN.—I think what you call a "Brief", we call a "Libel" or "Information".

Sir CHARLES RUSSELL.—It is variously phrased, "Case", "Factum", "Statement of claim", "Declaration". There are varying phrases for it.

Senator MORGAN.—The proceedings on the part of the Claimant we should term here an "Intervention", if there is an Intervention.

Sir CHARLES RUSSELL.—In this Brief (which I do not propose to trouble the Court by reading) he proceeds to state, in the first paragraph,

under what section the vessels in question are seized, these vessels being the "Anna Beck", the "Dolphin", the "Grace" and the "W. P. Sayward". Referring then to the statutes (with which I do not trouble the Tribunal), he then refers, in the next paragraph, to the "Rights of Great Britain and the United States", respectively. He next passes to the consideration of "A Treaty with Russia"; next to "Russia's Claims"; next to the "Authorities quoted", dealing actually with the authorities cited; then he deals with "Mr. Secretary Seward's views", which you will recollect my friend read at some length; and, finally on page 102, he sums up the matter, and gives his short answer to it very clearly, and, as I think, also very concisely. He says:

> It also appears that the United States, in claiming sovereignty over the Behring Sea, is claiming something beyond the well recognized law of nations, and bases her claim upon the pretentions of Russia which was successfully repudiated by both Great Britain and the United States.
>
> A Treaty is valid and binding between the parties to it, but it cannot affect others who are not parties to it. It is an agreement between nations, and would be construed by law as an agreement between individuals. Great Britain was no party to it, and therefore was not bound by its terms.
>
> It is therefore contended that the proceedings taken against the present defendants are *ultra vires* and without jurisdiction. But in order to press the matter further, it may be necessary to discuss the act itself under which the alleged jurisdiction is assumed.

Thereupon he proceeds to point out, very much on the lines I have been submitting to the Court, that there is nothing in the words of the statutes which necessarily include foreigners, and that according to proper principles of construction they ought not to be construed as applying to foreigners outside the territorial limits. He then concludes in these words:

> So here it is submitted that a decree of your Honour's Court will not give any validity to the seizures here made, and the defendants, in filing their demurrer and submitting this argument, do not thereby waive their rights, or submit to the jurisdiction of the Court.

Now finally I have to say that, as it has been so cited in the original Case, and set out at length in the documents which form part of the Appendix to the Case, it comes upon me a little by surprise, it is a little remarkable, that at this late stage of the controversy this contradiction should be suggested. I quite understand why my friends feel pinched by it, because the position is one absolutely impossible, if not ridiculous, for a great Power which has formulated its grounds of jus-
844 tification, and said: Upon these grounds I abide by the judgment of the Court, and by the judgment of that greater Court, the opinion of the civilized world: for it then to say: These are not the true grounds at all; the real grounds were something entirely different from these.

Although up to this moment the Tribunal will not have seen any trace of the affirmation of this simple ground, if it were present in the minds of any of the ingenious and well learned advisers of the United States, that all this reference to Statute law was wholly beside the question: We were but exercising our inherent rights of protection of property and property interests given to us by the consent of the civilized world—in other words, given to us by the law of nations.

Well, but let us see what was the ground upon which the judgments proceeded.

Senator MORGAN.—If both grounds had been stated in the libellant's case there would have been no repugnance between them.

Sir CHARLES RUSSELL.—Repugnance as to what?

Senator MORGAN.—To it being stated in the libel or information that the United States claimed a right under the laws of nations; and also, that it was possessed of a property right.

Sir CHARLES RUSSELL.—You mean to say if they had said we are complaining of a breach of the municipal Statute, and also complaining of a breach of law of property?

Senator MORGAN.—Yes.

Sir CHARLES RUSSELL.—Certainly there would have been a repugnance: I shall presently have to deal with that.

Lord HANNEN.—I suppose you are pointing to this: If it had been simply a seizure by virtue of this right of property, or protection of property, there would have been no right to fine.

Sir CHARLES RUSSELL.—Much more than that, my Lord: but to that, amongst other reasons. There would have been no right to fine; and the court that would have had the right to adjudicate upon a claim of that kind would not be sitting as a Municipal Court—a Court belonging to Alaska in the United States,—but would be sitting as a Prize Court representing the whole world. That is the real vital distinction; and the distinction that my learned friend Mr. Carter in his ingenious attempt to base the judgment, or justify the judgment, of this "Two penny-half penny" judge—as my friend in a moment of forgetfulness called him—is wholly futile. He has entirely forgotten that a Municipal Court, as such, does not administer International Law at all; it has to administer the law of the State, and the law of the State only.

Senator MORGAN.—That was a United States Court?

Sir CHARLES RUSSELL.—Yes. I intended, in a moment or two, to develope this idea, but as it is mentioned, let me just say a word upon it in passing. I am not concerned to dispute that the Sovereign Power at whose instance a capture is made upon the high seas may not constitute a Municipal Court, *pro hac vice*, a Prize Court; but according
845 to its original constitution and functions it is a Municipal Court having no cognizance of any law except Municipal law, and International law so far as it enters into Municipal law, but no further. To enable it to adjudicate as a Prize Court, it must be brought to the apprehension of the Judge that he is no longer in a United States Court administering the municipal law—that he must shut his eyes to Municipal law, and that he is administering International law in the interests of all nations. The distinction is broad, clear, unmistakable and intelligible. But I am proceeding still on the theory that he did not affect to act, that he was not asked to act, in any other character than as a municipal Judge construing a municipal statute, and for that purpose of course it is necessary to examine the judgment itself. The judgment is to be found on page 113.

The PRESIDENT.—This is on your point of fact that you are arguing all this?

Sir CHARLES RUSSELL.—Yes.

The PRESIDENT.—I understood that from the principles you laid down when you began this part of your argument?

Sir CHARLES RUSSELL.—Quite so. The judgment of Mr. Justice Dawson is to be found at page 113 of Volume I of the Appendix to the American Case. I will not read this judgment because it goes over the same ground as the later judgment which I desire to have read more fully. It relates to the seizures effected in 1886. He is addressing the jury, and telling them that the information is preferred and filed by the District Attorney, based upon an affidavit charging the Defendants with having

Judgment of Judge Dawson.

killed a certain number of seals and other fur-bearing animals in the waters of Alaska, contrary to the provisions of section 1956 of the Revised Statutes. He then proceeds to say that it is the duty of the Court to instruct the jury as to the law applicable to the facts, and that it is their duty to find the facts. Then he proceeds to say:

For the purpose of aiding you in your deliberations, I will define to you the western boundary line of Alaska as designated and set forth in the treaty of March 30, 1867.

He refers to that Treaty, and then he proceeds.

All the waters within the boundary set forth in this Treaty to the western end of the Aleutian Archipelago and chain of islands are to be considered as comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of fur bearing animals must therefore attach against any violation of law within the limits before described.

If, therefore, the jury believe from the evidence that the defendants by themselves, or in conjunction with others, did, on or about the time charged in the information kill any otter, mink, marten, sable or fur-seal, or other fur bearing animal or animals on the shores of Alaska, or in Behring Sea, east of the one hundred and ninety third degree of west longitude, the jury should find defendants guilty..

Then I skip one passage, and proceed.

The jury are further instructed, as a matter of international law, that it makes no difference that one or both of the accused parties may be subjects of Great Britain.

Russia had claimed and exercised jurisdiction over all that portion of Beh-
846 ring Sea embraced within the boundary lines set forth in the Treaty, and that claim had been tacitly recognized and acquiesced in by the other maritime powers of the world for a long series of years prior to the Treaty of March 30th, 1867.

Then he proceeds to set out, a little more fully, the terms of that Treaty, and then goes on to say that thereby America acquired absolute control and dominion over all the rivers, and so forth; and finally,

And British vessels manned by British subjects had no right to navigate the waters before described for the purpose of killing any of the furbearing animals heretofore designated.

Then the Jury are further instructed that on the 3rd of August the Act of Congress of 1870 was passed, that the lease was made, and so forth; and then the question of fact which is left to the jury is one with which he might have hardly troubled them, whether or not they were engaged in sealing to the east of what has been, for brevity, called the line of demarcation. So much for the judgment of 1886. The judgment of 1887 is on page 115, and the material parts of it, at least, must be read, and I will, therefore, with your permission, ask my learned friend to read it.

Sir RICHARD WEBSTER.—I will read it shortly. It is in the case of four ships, the "Dolphin", the "Anna Beck", the "Grace", and the "Ada".

The libel of information in the case of the schooner "Dolphin" is similar to the informations filed against the other schooners named, and alleges that on the 12th day of July, 1887, the commanding officer of the United States revenue cutter "Rush" seized the schooner "Dolphin" in that portion of Behring Sea which was ceded to the United States by Russia in the Treaty of March, 1867. That said schooner was violating section 1956 of the Revised Statutes in relation to the protection of seal life in the waters of Alaska. To the libel of information the Queen's counsel of British Columbia filed a demurrer, alleging that the district court of Alaska had no jurisdiction over the subject matter of the action, for the reason that the schooner was more than one marine league from the shore when seized, and that the Act of Congress of July 27th, 1868, is unconstitutional, in that it restricts free navigation of the Behring Sea for sealing purposes. A stipulation, signed by the Queen's counsel Mr. M. W. T. Drake, upon the part of the British owners, and Mr. A. K. Delaney upon the part of the United States, was filed, in which it was agreed and conceded that the masters of the vessels named were taking fur-seals in that portion of Behring Sea which is claimed by the United States under the Treaty with Russia of March, 1867.

The issue as presented involves an examination of a most pertinent and critical question of international law. It will be necessary to ascertain, first, the right of the Imperial Government of Russia to the Behring Sea anterior to the Treaty of March, 1867, and for information upon this subject I am largely indebted to Mr. N. L. Jeffries for a collection and citation of authorities and historical events, and for the want of books at my command upon this question, I am compelled to rely for historical facts upon his carefully prepared brief. From this elaborate brief I glean the following facts.

Then he describes the Sea of Kamschatka. He describes how Peter the Great in the early part of the Eighteenth Century directed the exploring expedition; the Court will be able to follow the dates. He talks of the expedition of 1725, and the expedition of 1728; and the discovery of the Island of Saint Lawrence; and the expedition of 1741.

847 Sir CHARLES RUSSELL.—Those are the events mentioned in the brief, which we have not read in full, and which are referred to in the order that the Judgment refers to them.

Sir RICHARD WEBSTER.—The vessels were the "St. Paul" and the "St. Peter"; and, on the 18th of July 1741, Behring first saw the Continent of America. And he describes Behring's visit.

The enterprising spirit of Russian merchants and traders even in Siberia was awakened by the accounts given of the industries that might be created.

The PRESIDENT.—That brief was the practical foundation of both judgments of 1886 and 1887, was it not?

Sir RICHARD WEBSTER.—Yes. At page 117 he refers to the Ukase of the 27th December, 1799, and then reads from Mr. Chief Justice Marshall's judgment in *Johnson v. McIntosh:*

On the discovery of this immense continent the great nations of Europe were eager to appropriate to themselves so much of it as they could acquire.

Then he refers to Chancellor Kent.

All that can be reasonably asserted is that the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety, and for some lawful end.

And then he refers to Vattel, and then, at the top of page 118, he proceeds.

The Queen's counsel lays much stress in his argument upon the fact that both the United States and Great Britain treated with Russia (the United States in 1824, and Great Britain in 1825) in relation to the free use of the waters in Behring Sea, and it is claimed that by these Treaties the sea was thrown open as the common property of mankind. But an examination of these Treaties and the objects in view by the three great Powers fails to warrant the conclusion reached in the argument. The principal parts of the Treaty between the United States and Russia, the treaty between Great Britain and Russia being similar, are thus set forth by Professor Wharton;

And he reads Articles 1, 2, 3, 4, and 5 of the Treaty of 1824. And at the bottom of the page he continues:

Nations, like individuals, have the right of contracts, and their treaties are subject to the same rules of interpretation and of morality which govern in municipal law.

"Estopped" in law is a term, the etymology of which implies the preclusion of a person from asserting a fact by previous conduct, inconsistent therewith, on his own part or on the part of those under whom he claims. It is in law a prohibition which denies a man the right of alleging or denying a fact in which he has with a full knowledge long acquiesced. Applying this rule the conclusion can not be escaped that in consequence of the acquiescence of Great Britain in the claim, jurisdicton, and dominion of Russia to what is now known as Behring Sea since the expiration of the Treaty of Russia and Great Britain in 1825, which was to exist ten years, Great Britain and her Dominion Government, of which British Columbia is a part, are estopped from any claim of right or privilege of taking fur bearing animals in Behring Sea, east of the line mentioned as our western boundary in the Treaty.

848 Then he mentions the western boundary, which is the line on the map, and then proceeds at the bottom:

The courts have the same right and power, when called upon to interpret a public Treaty, to derive aid from contemporaneous interpretation, and by ascertaining the intention of those whose duty it is, under the Constitution, to make Treaties, as they have in the interpretation of any other law. What then was the object in purchasing Alaska? Manifestly to extend our Northwest boundary line so as to include the whole group of the Aleutian Islands.

Then he refers to Senator Sumner's speech, and then:

Subdivision 2 of section 2 of the Constitution in defining the powers of the President says.

He shall have power, by and with the advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.

Then:

Judge Story, in considering this clause of the Constitution, says: It will be observed from this that the power to make treaties is by the Constitution general, and, of course, it embraces all sorts of treaties for peace or war, for commerce or territory.

Then:

It is argued that this question belongs to the political department of the Government, and that it should be there adjusted, but this position is, I think, wholly untenable, at least at this stage of the controversy.

Then the learned Judge cites Story on the question of making Treaties; and then I had better read at the bottom of page 120.

Congress recognized the right of the United States to the whole of the new acquisition by appropriating $7,200,000 to pay for the new territory, and on the 27th day of July, 1868, extended the laws of the United States relating to customs, commerce, and navigation over all the mainland, islands and waters of the territory ceded to the United States by the Emperor of Russia. [See Revised Statutes, sec. 1954.]

Showing unmistakably the understanding of the Government at the time as to what had been acquired, and that our boundary line was located at the one hundred and ninety third degree of west longitude. The longitude of a place is the arc of the equator intercepted between the Meridian passing through that place and some assumed meridian to which all others are referred. Different nations have adopted different meridians. The English reckon from the Royal Observatory at Greenwich; the French from the Imperial Observatory at Paris, and the Germans from the Observatory at Berlin, or from the island of Ferro. In the United States we sometimes reckon longitude from Washington, and sometimes from Greenwich. But in establishing the western boundary line of Alaska the reckoning of longitude was from Greenwich, which reaches the line dividing the Continents of Asia and North America.

The purchase of Alaska was unquestionably made with a view to the revenues to be derived from the taking of fur-seal in the waters of Behring Sea, and especially on the Islands of St. Paul and St. George, both of which were, by Act of Congress of March 3rd, 1869, made "a special reservation for Government purposes".

Secretary Seward was a skilled diplomat, a learned man in statecraft, and he evidently foresaw the income to be derived by the Government from the seal industry on and adjacent to those islands. Hence, in the negotiation he insisted upon,
849 and Russia conceded, that our boundary line should be extended to the meridian named in the Treaty. The industry and consequent revenues would be hopeless without the residuary power of the United States to protect and regulate the taking of fur-bearing animals in that part of our domain. The effort of the United States to seize and drive out the illicit piratical craft that have been navigating those waters for years, indiscriminately slaughtering fur-bearing animals, the continuation of which can but result in the wanton destruction of the rookeries, the most valuable in the world, is a legitimate exercise of the powers of sovereignty under the law of nations, with which no nation can lawfully interfere.

The question of the constitutionality of the Act of Congress of July 27th 1868 (Revised Statutes, page 343), scarcely deserves notice, since it has been sustained by this court.

The conclusion I have reached is that the demurrer must be overruled, and it is so ordered; and that judgment of forfeiture to the United States be entered against each of the vessels separately, together with their tackle, apparel, furniture, and cargoes, saving to the masters and mates their private property, such as nautical instruments and the like.

Sir CHARLES RUSSELL.—I think there can be little doubt, at least I submit there can be little doubt, that I am now warranted in assuming that the Tribunal, having followed this argument, cannot fail to have arrived at this clear conclusion: that these vessels were seized for a supposed breach of a municipal Statute, that the men were imprisoned by the judgment of the Court, and that the confiscation of the vessels seized was part of the penalty attached by the municipal law for this breach.

Now, I have a word to say, before I ask the Court's permission to sum up the general conclusions, about the character of the Court itself. It is a municipal Court administering the municipal law, part of which municipal law undoubtedly is, as far as it enters into municipal questions, international law. But a Prize Court is a distinct Court, with distinct functions; not acting upon municipal law but shutting its eyes to municipal law altogether as such; deriving its authority, no doubt, from the appointment of the Sovereign Power that has caused the marine capture to be effected, but although deriving its authority from that creation, from the moment that it has created it it ceases to be a municipal Court. I should have thought these things were almost elementary in the subject, but as my learned friend, Mr. Carter, did not appear even to think it necessary to consider what must be the character of an international Court if its decree is to be regarded as a judgment of an international Court, I must call the attention of the Court briefly to some authority upon the subject.

The distinction between Prize Courts and Municipal Courts.

I cite the work well-known in England and, I think, not unknown in America, Manning's "Commentaries on the Law of Nations"; and the edition from which I cite is the one published in 1875 by Mr. Sheldon Amos, himself a writer of distinction, a member of the Bar and Professor of Jurisprudence at University College, and Lecturer on International Law to the Council of Legal Education of the Inns of Court in London; and on page 472 he says:

> Questions of maritime capture are adjudged by Courts specially constituted for that purpose. The form of these Courts is different in different countries, but in all they are distinct from the municipal tribunals of the country and are commis-
> 850 sioned to decide according to the law of nations, including the engagements of treaties where any such exist.

I need not stop to point out that, as between two countries who have entered into a treaty which gives to the two Powers, parties to the treaty, rights, among others it may be rights of capture, those treaties constitute as between those Powers, and as binding upon them, a portion of international law. Ordinarily speaking, Prize Courts have to deal with a state of belligerency; as, for instance, where, in the struggle for mastery, one Power seeks to obtain possession of the property and the resources of another, or where one Power seeks to get hold of contraband of war, which, if obtained by its opponent, would be of importance to that opponent in the fight: or, again, questions of seizure for running a blockade—questions, which would arise when the ship was brought into the Prize Court, whether the blockade was effective, questions whether the blockade had been properly notified, and other questions of that description. Ordinarily, therefore, Prize Courts have to do with a state of belligerency, not exclusively, but the main exception—I will not undertake to say the sole exception, though I know no other—is cases of capture, where quasi-belligerent rights are exercised or exercisable under treaty as between particular Powers; thus, for instance, assuming there is a Slave Trade Treaty between the United States of America and Great Britain by which rights of search are conceded to

the respective Powers, and the right of seizure of vessels engaged in carrying on that trade, a seizure effected by one or other of the Powers brought into a Prize court, the question in that case would not be whether, according to the general international law, the seizure was justifiable and confiscation ought to follow, but whether by international law, plus the provisions of this treaty, the particular property had or had not been justifiably captured.

Mr. Justice HARLAN.—It may assist you in your argument, Sir Charles, for me to suggest that this Court in Alaska has jurisdiction which is defined by an Act of Congress, as it exercises only such jurisdiction as the Act creating it authorizes.

Sir CHARLES RUSSELL.—That is my point. I am obliged to you, Mr. Justice Harlan, for mentioning it.

Lord HANNEN.—Have you got the Act?

Sir CHARLES RUSSELL.—I have not, but my learned friends can place it at our disposition.

Mr. PHELPS.—They have prize jurisdiction under the general judiciary Act.

Sir CHARLES RUSSELL.—I should like to see it.

Mr. PHELPS.—We will bring it in.

Sir CHARLES RUSSELL.—I began, early in my observations, by saying I did not stop to consider the question whether or not a municipal Court might or might not be constituted a Prize Court. My point here is that it was *not invoked* as a Prize Court; that no proceedings of any
851 kind which bear the faintest resemblance to proceedings in a prize suit were instituted. It cannot be at one and the same time performing the functions of a municipal Court and of an international Court. The two positions are repugnant and inconsistent the one with the other. In the one, the judge is administering the municipal law, and in the other he shuts his eyes to the municipal law and administers international law and international law alone.

Senator MORGAN.—You say that you could not embrace both grounds of forfeiture in the same Information.

Sir CHARLES RUSSELL.—Unquestionably that is my contention. That is made clear if the Tribunal will bear with me a little longer, in the same book, at page 479, where the point is further discussed.

For the history and true limits of the jurisdiction of the English High Court of Admiralty in prize cases, see Lord Mansfield's judgment in *Lindo* v. *Rodney and another*, cited in a note to *Le Caux* v. *Eden*, Douglas' Reports, volume II, page 594. His lordship distinguishes the functions of the judge of the court under his general commission and those under a special commission issued only in time of war. This distinction gives rise to the two aspects of the Court of Admiralty, that of an "instance" court and that of a "prize" court.

You will recollect I called attention yesterday to the language in relation to this particular Court which pointed to it being regarded as an "Instance" Court and a Court of original jurisdiction.

"The manner of proceeding", says Lord Mansfield, "is totally different. The whole system of litigation and jurisdiction in the prize court is peculiar to itself; it is no more like the Court of Admiralty than it is to any court in Westminster Hall." By the Naval Prize Act of 1864, which recited that it was expedient to "enact permanently, with amendments, such provisions concerning naval prize and matters connected therewith as have heretofore been usually passed at the beginning of a war" the High Court of Admiralty has jurisdiction given it throughout Her Majesty's dominions as a prize court, and an appeal is given to the Judicial Committee of the Privy Council.

I point out that that is very much like the case my learned friend suggests; that this is a Court which has power to act as a Prize Court

under the Act of Congress, because under the Naval Prize Act of 1864 there is given to the Court of Admiralty powers to act as a Prize Court. Now he proceeds.

The true functions of a prize court are curtly expressed by Lord Mansfield in the course of the judgment above referred to. "The end of a prize Court is, to suspend the property till condemnation; to punish every sort of misbehaviour in the captives; to restore instantly, *velis levatis* (as the books express it, and as I have often heard Dr. Paul quote), if, upon the most summary examination, there don't appear sufficient ground; to condemn finally, if the goods really are prize, against everybody, giving everybody a fair opportunity of being heard. A captor may and must force every person interested may force him to proceed to condemn without delay".

And Lord Stowell says:

It is to be recollected that this is a court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it is
852 the administration of the Law of Nations, simply and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which it is well known they have at all times expressed no inconsiderable reluctance.

Let me repeat those words:

And what foreigners have a right to demand from it is the administration of the Law of Nations, simply and exclusively of the introduction of principles borrowed from our own municipal jurisprudence:

Then:

In forming my judgment, I trust that it has not for a moment escaped my anxious recollection what it is that the duty of my station calls from me, namely, not to deliver occasional and shifting opinions to serve present purposes of particular national interests, but to administer with indifference that justice which the Law of Nations holds out without distinction to independent States, some happening to be neutral and some belligerent; the seat of judicial authority is indeed locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality.

Now, I have further to point out that it is impossible—even if it had been before the learned Judge it would have been impossible—for him upon the grounds now advanced to have entered upon the question in any other light than that in which he did enter upon it, namely, the construction of this municipal Statute. Why? It is now said—and let there be no doubt about the clearness of my enunciation of what is now said—that the right of the United States is based upon the fact of property in seals; property in, and industry founded upon, seals; that that property right or interest carries with it further the right to do whatever in the judgment of the nation is reasonably necessary anywhere—everywhere—to protect that property and that property right. That is the allegation. Let me point out that nowhere was that ever suggested until the parties were preparing to come here to put this case before you; that their case has been from the first based upon a right restricted in a defined and local area. They say that this Statute is the equivalent of an international regulation for the protection of their own rights. It cannot be so treated. If it is a right that is incident to property, it must follow property wherever property is: but this international regulation embodied under this municipal Statute applies to a defined area, the part of the Behring Sea east of the line of demarcation.

I sum up therefore the whole of my argument on this point by inviting this Tribunal to find, first, the fact of these seizures; next, the fact that they were seized by the authority of the United States; next, that they were seized for breach of a municipal Act, and for that cause *only; next that* the judgment was claimed, and the judgment was

based, upon a breach of that municipal Statute only, and that that municipal Statute purported to prevail and to be effective in a defined area.

If these facts are found (and I have already undertaken to formulate them in a more precise way and to put them in writing for the Tribunal) the conclusions are inevitable that these seizures were unwarranted: that they were an attack upon the equality of Great Britain on
853 the high seas: that they were unwarranted by the law of nations, the ships of Great Britain on the high seas being part of the territory of Great Britain: and that an offence has been thereby committed against international law, and against the sovereignty of the Queen, for which we are entitled to demand adequate and just compensation.

Let me guard against a possible misapprehension. The Tribunal will understand that so far I am arguing upon the question, Were these measures justifiable or not. My argument has tended to show that they were not justifiable on the grounds that were then advanced. My argument has further tended to show that even if there were such a right in respect of property—such a right of protection as is now advanced—that that right cannot be invoked in justification of these seizures. The conduct of the United States, the whole tenour of their proceedings, prevents them from being entitled to raise any such question as a justification for such seizure.

But I wish the Court to understand that I do not thereby mean to say that they are shut out from the discussion or the claim of that right. When I come to the larger, the general question,—I have been confining myself, of course, to the question of seizure, as I hope the Tribunal understands,—when I come to the question in its proper order, I will discuss whether any such right exists, and what will be the sanction which by international law, if it existed, could be brought into use in support of that right.

Senator MORGAN.—I believe, Sir Charles, you do not claim that the United States is estopped by that decision from going fully into the question.

Sir CHARLES RUSSELL.—No; that is exactly what I want to convey. I say as regards the question of the justification for those seizures, the United States are not estopped from raising the general question which the Tribunal has to decide.

Senator MORGAN.—Then why are they estopped on the question of seizure, if you did not take an appeal?

Sir CHARLES RUSSELL.—Because they did not profess to act according to international law; because they did not act according to international law; because the Court was not an international Court; because it did not profess to be an international Court; because the case of the United States was put on a different ground, and the Judge acted on a different ground. But I do not suggest that they are estopped from arguing the general question when it comes in the order of these questions which the Tribunal has to decide.

The PRESIDENT.—I suppose you admit that in case the seizures were to be authorized or could be authorized, in your opinion, by other grounds than those indicated in the Judgment, you would not consider that we should be bound to declare the United States answerable?

Sir CHARLES RUSSELL.—I certainly do, Sir. As regards the seizures which have actually taken place I contend that the United States
854 must rely upon the case they have themselves presented, and which they have themselves made the basis of the Judgment they invoked from the Court.

Senator MORGAN.—If there was an error in the Judgment of the Court, you had your right of appeal to correct it.

Sir CHARLES RUSSELL.—Except that, as a matter of fact, there was no right of appeal.

Senator MORGAN.—None?

Sir CHARLES RUSSELL.—No. If that be questioned, I can refer to the fact. We gave notice of appeal, and it turned out that the judicial arrangements were in a somewhat rude state in Alaska, and there was no Court to which it could be had at that time.

Senator MORGAN.—The case was not beyond the power of prohibition.

Sir CHARLES RUSSELL.—Now you are touching upon a thorny subject, on which men may well differ. I can only say it was thought by those advising the Government of Her Majesty, or the Canadian Government, that it was worth trying if there could be a prohibition. But Mr. Justice Harlan was of a different opinion.

Mr. Justice HARLAN.—In one of those cases, the appeal taken by the vessel—I think so, but the book will show—was dismissed by the pelagic sealers themselves.

Sir CHARLES RUSSELL.—On the ground, as I am informed, and as the papers show, that though they gave notice of appeal, it turned out, owing to the imperfection of judicial arrangements then existing—they have been set right since—there was no Court to go to.

Mr. Justice HARLAN.—Perhaps not the imperfection of judicial arrangements, but the want of proper preparation of the case for an appeal under the Statute.

Sir CHARLES RUSSELL.—I think not, with deference.

Mr. Justice HARLAN.—Well, I may be wrong.

Sir CHARLES RUSSELL.—At all events, if that is a matter that presses on the mind of the Court, I will take care to come furnished with the exact facts, but I think it is not important. It is not a case, as the members of the Court will recognize, of litigation as between subjects, and where the judgment of a Court may work a grievous wrong, which may give rise to the need for diplomatic intervention; in which case it is a diplomatic rule that all modes of possible redress furnished by the judicature of the country should be pursued before diplomacy will intervene. That is a clear rule, but it has never been held to apply to an Act of State, where the contention was, on one side, that the State was acting, or the authority of the State was being invoked, to bind another State outside the limitations of law. My learned friends have not made that point, and it is so bad a point that I do not expect it will be made.

EXAMINATION OF THE FIRST FOUR QUESTIONS OF ART. VI.

I come next—and I am very glad to feel I am making some little progress, not as much as I could wish—to the questions 1, 2, 3
855 and 4 in Article VI, upon which the Tribunal will remember that whatever position in argument is taken by the learned counsel on one side or the other as to suggesting a greater or less relative importance to those questions, yet that course does not affect the duty of this Tribunal, the obligation, I may respectfully say, of this Tribunal, to decide upon their meaning; because Article VI requires "that the award of the Arbitrators shall embrace a distinct decision upon each of the said five points".

I group those four questions together for an obvious reason of convenience. They naturally hang together. The first deals with the

question of Russia's assertions of right; the next deals with the question of Great Britain's recognition of, concession of, those rights; the third deals with the question of whether the Behring Sea was included in the phrase "Pacific Ocean" in the Treaty of 1825; and the fourth deals with the transmission by cession of whatever rights Russia had to the United States.

They naturally, therefore, hang together. The first comment I have to make, Mr. President, is this: In view of the present state of this controversy, it must strike you as odd why these questions have been formulated at all; why you should be troubled with the decision of questions which the learned counsel for the United States tell us have no real importance or value at all. Why do I say that? Because they tell us that it does not matter what rights Russia exercised or what rights were conceded to Russia by Great Britain; the right they are standing upon is a right which they have inherent in their territorial dominion; attached to their rights of property interest in the fur-seals or in the industry founded upon the fur-seals; dependent upon no prior action, controlled by no prior action, but simply a right inherent.

But I have first to ask the Tribunal to determine whether that is the question of right at all; it obviously is not one which is referred to in the first of these questions. We are told by my learned friends now, that Russia was not exercising general rights of jurisdiction and sovereingty, but was only protecting by regulations her industry and her property rights. But that is not the question which is raised, and that was not the true character of the claim of Russia at all. Let me just examine that case, for it is necessary in order that the Tribunal should give the correct answer. What is the question? The question is, What exclusive jurisdiction in the sea now known as the Behring Sea, and what exclusive rights in the seal fisheries therein Russia asserted and exercised. It is clear, for the reason that I have given, that it cannot be a right in respect of property or property interest which is adverted to, because, as I have more than once pointed out, such a right in relation to property or property interest as is claimed is not a right which has any legal circumscription at all. It is a right which exists wherever the property is. It is the right of defence of the possession of property against any man who attacks that property wherever that property is, and wherever, therefore, it needs to be defended.

856 That, therefore, is not the kind of right referred to as the "exclusive jurisdiction" of the United States. What then does it mean? It means, What sovereign authority, exclusive of all other Powers, and in a defined and definite area, was exercised by Russia.

In other words, what sovereign authority, exclusive of all other Powers was exercised by Russia in the Behring Sea? That is the character of the question contemplated and put in question one, the first question of Article VI. Exclusive jurisdiction in the Behring Sea: Territorial sovereignty which brooked no rival in that sea. Exclusive in the same sense that there is exclusive territorial dominion on the land. And I must refer to some documents which have not yet, I think, been adverted to, as showing that that was what was meant when this case was originally presented by the United States. I do not know whether any of you gentlemen have ever compared this original Case of the United States as regards the questions put, and the space devoted to the consideration of those questions relatively compared with the space they have assumed in the written argument

of counsel, and in the oral argument of counsel. Let me ask your attention to the matter. The whole of this Case on the part of the United States up to page 84 is conversant with what may be called their claim of title, and that claim of title is based wholly upon the rights exercised by Russia as they allege, recognized and conceded by Great Britain as they allege; and to which rights, so recognized and conceded, they in 1867 succeeded by the treaty of that year. It is only at page 85—I pray your attention to this, for it is important—that we find any reference to the claim which now takes so prominent a part in the discussion of the question. After having elaborated the Russian part of their Case, on page 85 is a paragraph which begins thus:

> But in determining what right of protection or property this Government has in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside of the ordinary three-mile limit, it is not compelled, neither does it intend, to rest its case altogether upon the jurisdiction over Behring Sea established or exercised by Russia prior and up to the time of the cession of Alaska. It asserts that, quite independently of this jurisdiction, it has a right of protection and property in the fur-seals frequenting the Probilof Islands when found outside the ordinary three-mile limit.

And here is the whole argument in support of that right, that novel right, as I think it is admitted to be:

> And it bases this right upon the established principles of the common and the civil law, upon the practice of nations, upon the laws of natural history, and upon the common interests of mankind.

I have here read every word of the argument in this Case of the United States in support of this claim of protection and property, which is now the great portion of their argument.

Mr. FOSTER.—The next paragraph will throw a little light upon it.

Sir CHARLES RUSSELL.—Oh, of course they go on to justify
857 that by the details of seal life; I am perfectly aware of that. I am talking of argument, Mr. Foster. That interruption is needless. I read the next paragraph:

> In order that this claim of right of protection and property may be clearly presented, it will be necessary to enter in some detail upon an examination of fur-seal life at the Pribilof Islands and elsewhere, and of the various interests associated with it.

I am dealing with the argument, and not with the statement of facts. I have said from the beginning, and I shall not recede from it, that so far as the decision of the question of property in these animals, free swimming animals in the sea, breeding upon those islands, and spending a considerable part of their life there, is concerned, it depends in our view upon facts that are not in dispute at all. I am dealing with their argument, and here it is. They base this claim "upon the principles of common and civil law, upon the practice of nations, upon the laws of natural history, and upon the common interests of mankind."

The forged translations of the Russian documents.

But it does not rest there. According to the information which they then had, and which they believed was reliable information, they had got a most valuable body of testimony for the purpose of establishing that Russia had made these claims, and that the concession of these claims had been recognized by Great Britain; that Russia had asserted these and had acted upon the assertion without contradiction by Great Britain; and to show that that is so I am led to call attention to the performance of that very astute, but unscrupulous artist, Mr. Ivan Petroff. Will the Court favor me by turning to page 41 of the United States Case? I do not know whether that has been done for you which I have had done for

me, but which if done will enable the Tribunal to see at a glance how completely and absolutely the United States have changed front upon this question since the discovery of these forgeries upon which they had based their great case of derivative title from Russia. Cut out these forgeries, and you have no reference to the fur-seals, no assertions by Russia in respect to the waters of the Behring Sea, no acts of interference asserted or suggested by Russia in that sea at all.

Now let me just justify this, although it may take a little time, I am afraid.

On page 41 you will see what purports to be a quotation from the Board of Administration of the Russian-American Company, beginning with the words: "With this precious Act in your hand." Every word of that from those words: "With this precious Act", to the end of the page, is a forgery, an interpolation; and Mr. Ivan Petroff understood very well what he was about, because he makes this Ukase of 1821 speak in this language—this is the concluding sentence:

> We can now stand upon our rights, and drive from our waters and ports the intruders who threaten to neutralize the benefits and gifts most graciously bestowed upon our Company by His Imperial Majesty.

858 Turning to the next page you will find a letter from the Board to the Chief Managers of the Colonies beginning "As to fur-seals", down to the word "future" at the end of that paragraph—it is all a forgery:

> As to fur-seals, however, since our Gracious Sovereign has been pleased to strengthen our claims of jurisdiction and exclusive rights in these waters with his strong hand, we can well afford to reduce the number of seals killed annually, and to patiently await the natural increase resulting therefrom, which will yield us an abundant harvest in the future.

A complete interpolation; not a reference—I speak subject to correction, but I believe I am right—not a reference in any one document to fur-seals at all. In point of fact we know from the Report of the Committee of the House of Representatives of the United States in 1876, which I referred to before, that in the Russian time the existence of the fur-seal was considered a matter of very little importance; and it is stated in that Committee's Report that it had yielded no profit, or no considerable profit at all, during the time of the Russian Government.

Then again on the next page, 43, the Tribunal will observe about the bottom of the page, the words, "and on the islands and waters situated between them"—also a forgery; and a little further down the words, "The coast of Kamchatka, the Kurile Islands and the intervening waters"—also a forgery: an interpolation, for the purpose of building up the case, which he thought was the case—and was justified in thinking was the case—which the United States were making. He lends himself to the series of forgeries to build up that case.

Then take the text, which is very remarkable, on page 44. You will observe at the top of the page, the third line, the words, "And the intervening waters (Behring Sea)". Every one of those words is a forgery—interpolated. The original reads thus:

> The other ship, however, (sailing from Petropavlovsk), having examined the eastern coast of the Kamchatka peninsula up to 62° of northern latitude, and the west coast of America from this latitude to the island of Unalaska, should proceed to Kadiak and from there to Sitka for the winter.

But this ingenious gentleman makes it read:

> From this latitude to the Island of Ounalaska and the intervening waters (Behring Sea) should proceed to Kodiak.

Lord HANNEN.—Is that a part of the forgery, "Behring Sea".

Sir CHARLES RUSSELL.—Yes; from the word "and" to the word "sea" inclusive.

I am most anxious that the Tribunal should realize that if these forgeries are cut out of this case of Russia's assertion and of British concession, there is nothing left: that the whole question resolves itself into the action of the Powers, the United States of America and Great Britain, the assertion in the Ukase of 1821, and upon the consequences of the subsequent cession.

859 Then as to the next quotation on the same page, 44: it stands in the original thus:

The object of the cruising of two of our armed vessels is the protection of our colonies. . . . .

Lord HANNEN.—Where is that comparison of parallel columns?

Sir CHARLES RUSSELL.—I will give it to you, my Lord. You will find it in the Appendix to the British Counter Case, Vol. I, page 11.

I will occupy one or two moments longer, with the permission of the Tribunal. If the Tribunal will take a note of the page they will see at a glance, because we have underlined the interpolations. But may I, before the Court rises, just call attention to two more. The way he has ingeniously altered the sentence I have just read is to make it run thus:

The object of the cruising of two of our armed vessels. . . . . is the protection of our colonies, and the exclusion of foreign vessels engaged in traffic or industry injurious to the interests of the Russian Company as well as to those of the native inhabitants of those regions.

Then, on the next page, page 45, is a very neat little introduction. It ran originally thus:

By a strict observance of such rules, we may hope to make this industry a permanent and reliable source of income to the Company, without disturbing the price of these valuable skins in the market.

He has improved it, thus:

By a strict observance of such rules, *and a prohibition of all killing of fur-seals at sea or in the passes of the Aleutian Islands*, we may hope to make this industry a permanent and reliable source of income to the Company, without disturbing the price of these valuable skins in the market.

A most ingenious gentleman, this; but I need not say he understood what he was about. He understood the contention perfectly. He realized it most completely.

Then at the bottom of page 46. It originally ran:

and Okhotsk and prohibited them from engaging in trade.

And he has ingeniously altered it, and inserted these words:

and from hunting and fishing in all the waters of Eastern Siberia.

Then he adds boldly a full sentence. Again, this is all his concoction:

In conclusion, it is stated as the decision of His Majesty, the Emperor, in view of possible future complications of this nature, that no contracts involving the free admission or navigation for trade of foreign ships or foreign subjects in the waters adjoining or bounded by the coasts of Russian colonies will be approved by the Imperial Government.

I need not remind you of what is, I think, present in your minds, namely, that in Russian legislation, while Siberia and Kamchatka are spoken of as part of the realm of Russia, Alaska, on the other hand, is always spoken of as a colony of Russia.

860 Lord HANNEN.—How much of that last is interpolated?

Sir CHARLES RUSSELL.—The last sentence that I read, beginning with the words, "In conclusion", and ending with the words "Imperial Government".

Lord HANNEN.—You were giving the passages relied on in the United States Case?

Sir CHARLES RUSSELL.—Yes, that is my point; I am anxious to bring these passages on which the United States relied to the attention of the Court. I hope the Tribunal realizes the importance of this matter.

The PRESIDENT.—Sir Charles, I would suggest that yesterday you read us a despatch of Mr. Blaine, from which it appears that the suggestion of Mr. Blaine, and almost his very words, were the origin of these four or five questions put in the sixth Article of the Treaty. Well, I suppose, when Mr. Blaine framed these questions in his despatch, and asked that they should be incorporated into a treaty with England, I suppose he relied on some intrinsic arguments of value. Do you think he already had a knowledge of these interpolations of Ivan Petroff?

Sir CHARLES RUSSELL.—I am not in a position to inform the Tribunal upon that point.

The PRESIDENT.—I think he did know, as these interpolations have been withdrawn by the United States counsel.

Sir CHARLES RUSSELL.—Certainly, I should judge—it is a mere speculation, and of course my friends would know much better than I—I should judge he had these before him.

Lord HANNEN.—That is to say, he had these original translations?

Sir CHARLES RUSSELL.—Quite so.

Lord HANNEN.—And was deceived by them.

Sir CHARLES RUSSELL.—I should judge so; but I do not know.

Mr. FOSTER.—If it is not an unnecessary interruption, I would explain about that.

The PRESIDENT.—General Foster, will you kindly explain that.

Mr. FOSTER.—With the President's permission. I will say that Mr. Blaine had no knowledge whatever of the contents of these documents. They were not known to any person in the Department, or any official of the Government of the United States, until after we began to prepare this case, when this person named by Sir Charles was called upon as an expert in the Russian language to translate them.

The PRESIDENT.—It is a question of dates, I suppose, which it is easy to ascertain?

Mr. FOSTER.—As to the translation?

The PRESIDENT.—Of course you know when the translations were made, and when you first had to deal with this Ivan Petroff.

Mr. FOSTER.—As to the matter of dates, they were not known until after the ratification of the Treaty, April 9, 1892.

Mr. Justice HARLAN.—You mean the existence of the documents?

Mr. FOSTER.—No. The existence of these Russian documents
861 was known. The contents of the documents were not known. They had not been translated. The officials of the Department of State, of course, knew that we received from the Russian Government under the Treaty certain archives and documents of the Government of Alaska. These were sent to Washington and placed in the Department of State. Their contents had never been translated; and as there are very few persons in the United States, especially in Washington, who are acquainted with the Russian language, the contents were not known to the officials of the Department. But the existence of the documents was known, and when this case came to be prepared, it naturally sug-

gested itself to the persons having charge of it that it would be well to examine the contents of those documents, whereupon this man Petroff was employed to translate them.

The PRESIDENT.—But you do not suppose that Mr. Blaine, when he originated his suggestion, which had as a conclusion the insertion of the article in the Treaty, relied upon these.

Mr. FOSTER.—It is not a matter of supposition. It is a fact that Mr. Blaine did not know what were the contents of the documents now under discussion.

The PRESIDENT.—Sir Charles, do you not think that would be of some importance for your argument; because, as you are going on about these interpolated documents, and they are practically withdrawn, if they are in themselves quite independent, that is to say, if they are not material for the framing of Article 6—well, I leave that to you to judge, of course. You know best.

Sir CHARLES RUSSELL.—I am pursuing this—I did not intend to pursue it at great length—for two reasons: first, to show what was the real meaning of the "exclusive jurisdiction" and the "rights" mentioned in the first question of Article 6; to show that that meant an exclusive right of territorial sovereignty assumed by Russia, and conceded to Russia—that is my main point: and that at the time this Case was prepared it was the great strength of the case that the United States were prepared to put forward; that that is shown in the way in which it is elaborated here; and, lastly, that excluding these Russian interpolations or forgeries, nothing remains to support the claim based upon Russian assertions, excepting the Ukase and the Treaties in relation to the Ukase.

The PRESIDENT.—So you suppose that, as concerns Mr. Blaine, and when he originated these questions, you suppose he relied exclusively upon these documents, but not upon these interpolations.

Sir CHARLES RUSSELL.—I accept, of course, what Mr. Foster says, speaking from his own experience, that Mr. Blaine did not know of these documents at the time, and that therefore he was relying upon the view that he took of the Treaties. There are references in his correspondence which I will not now refer to, which I find a little difficulty in accounting for except by reference to some of these documents—I mean as to acts of assertion by Russia, which I do not find vouched for anywhere else except in these documents.

862 Mr. CARTER.—Can you point to anything in Mr. Blaine's letter indicating that he knew of the contents of these documents?

Sir CHARLES RUSSELL.—No; I do not say these documents. I do not doubt Mr. Foster's statement in the least upon the subject; but Mr. Blaine must have had some idea that there were in existence documents which would support the statements that there were acts of assertion by Russia which could be relied upon.

Mr. FOSTER.—Why did he not produce them at the time?

Sir CHARLES RUSSELL.—I think you will find, if you read his letter, that he speaks again and again of acts of authority by Russia, assented to by Great Britain.

May I be permitted to make one suggestion which would, I think, have the very desirable result of cutting short my argument upon this part of the case. You see, the United States have withdrawn the forged documents, and presented re-translations. They have not altered the Case as it was originally presented. I have had enclosed for me in red brackets the interpolated passages in the Case, and if it would be permissible I can get that done as regards each of the Cases of the Arbi-

trators, so that they can see at a glance the important part—I consider it is important—that these interpolated passages bear in the argument, and how bare it stands of authority if these interpolated passages are excluded.

Lord HANNEN.—That is what you are going to show next?

Sir CHARLES RUSSELL.—Yes.

Lord HANNEN.—Taking out the interpolated passages there does not remain the foundation for the claim of a derivative title from Russia?

Sir CHARLES RUSSELL.—That is it.

Mr. Justice HARLAN.—So much of the case as rested on those documents that contain the interpolations, has been formally withdrawn by the United States?

Sir CHARLES RUSSELL.—Oh, that goes without saying, of course.

Mr. Justice HARLAN.—I understood you to say otherwise; that is the reason I interposed. Somebody said the Case had not been modified by reason of that. I simply respond to that.

Sir CHARLES RUSSELL.—My friend merely meant that from the physical Case the passages had not been excised.

Mr. PHELPS.—The Case is re-stated in the Counter Case.

Sir CHARLES RUSSELL.—Yes.

The Tribunal here adjourned until Tuesday, May 16, 1893, at 11.30 o'clock A. M.

TWENTY-THIRD DAY, MAY 16TH, 1893.

Sir CHARLES RUSSELL.—Mr. President and Gentlemen, I resume my argument upon the construction of the first question in Article VI; and, before doing so, I wish for one brief moment to refer to a matter which I am afraid, and I am sorry to find, has caused some irritation to my learned friends on the other side; I mean the reference to the falsification of certain documents which appear in the original case. I wish our position in that regard to be made quite clear to the Tribunal. We do not in the least suggest, and never have suggested, that those who represent the interests of the United States were in any way blameworthy in that matter; they were simply deceived; and we accept, as I think I said before, implicitly the statement of General Foster, that when Mr. Blaine was conducting his diplomatic correspondence he was not aware of the contents of these Russian documents. But we thought it necessary, and we still think it necessary, to call attention to that fact in order to show that, according to our view, the case—the substantial case—originally presented on the part of the United States was a case of territorial jurisdiction in Behring Sea, territorial dominion in Behring Sea; and that once these falsified documents are expunged the whole of that question depends upon the construction of the Ukase of 1821, the action following on that Ukase, and upon the construction of the Treaties of 1824 and 1825. We feel it necessary to call attention to those falsifications and to suggest—we may be right or we may be wrong, but it is the view that we submit on this matter—that it is the discovery of these falsifications by which the representatives of the United States were deceived which has led to their change of front;—namely, the change, on which I have already dwelt at such length, by which the question of derivative title under Russia, the question of territorial dominion exercised by Russia, has receded into the background to make room for the different case now presented.

I called attention at the last sitting to the case of territorial dominion which was originally presented on the part of the United States. I showed that that case was consistent with the attitude which the United States had pursued: that it was consistent with the course which the Executive had pursued: that in invoking the aid of their municipal statute as they did they were proceeding on the notion of territorial dominion, and the application within that territorial dominion of their municipal statute, and of that municipal statute alone; and that there was no trace to be found in the proceedings of a suggestion of the exercise of an inherent protective right of property
864 or of property interest. I am not going to enlarge upon the subject again, but I observe in passing that I did call attention, in connection with those proceedings in the Alaska Court, to two circumstances which make our position still more apparent.

The first circumstance I called attention to was this. It was said that although this Alaska Court is a municipal Court, yet it had also Prize Court or International Court functions. I will not stop to question that; but what I desire to point out is this, that once it exercises or purports to exercise international functions, then the law which it

has to administer is something entirely different from the law it has to administer as a municipal Court. Let me explain that point, and pass on. Let me assume for a moment that the Counsel for the United States, in those proceedings, had said to the judge: "We are claiming that you, this Court, shall exercise functions as an international tribunal, as a Prize Court, and that you shall proceed to pass judgment upon the question whether this seizure for the cause that we allege was justified by International Law."

What would have been the first thing that the Judge must have done when that contention was put before him? The first thing he must have done would be to say this: "Then if I am sitting in an international Court, and exercising the functions of a Prize Court, municipal law is not my guide."

I will take the ground my learned friends put when they say they are entitled to do anything, within certain reasonable limits, necessary for the protection of their property and of their interests. Immediately the Judge would be obliged to consider—would necessarily be face to face with the consideration—whether international law, under such circumstances, justified the seizure at all; and, in the next place, whether international law annexed to the offence, alleged to have been committed against international law, the particular sanction of search and seizure of the vessel which the Government had adopted, to say nothing of the further sanctions of imprisonment of the men and confiscation of the vessels which that Government demanded. But there is not a trace of the suggestion in the whole of the judgment or in the brief to which I have already referred, that the Judge was asked to consider the question in any other aspect than that of municipal law.

Now since I am upon this, and it is also relevant to the character of the right—the exclusive jurisdiction and the exclusive rights referred to in question 1—I have followed up to the end these proceedings in the "Sayward" Case, and I have before me here—Mr. Justice Harlan will recognize it—the shorthand report of the argument of the Solicitor General of the United States, who appeared before the Supreme Court at Washington in answer to an application for a prohibition; and I beg the Tribunal to recollect that this brings us down to a period as late as 1892, last year, at the time when the Treaty was being discussed; and I will read to the Court the ground upon which that learned gentleman in a very able argument puts the case of the United
865 States. I will hand this copy of the proceedings in the case, if it is not already in the possession of the Tribunal, to any member who wishes it. I read from page 54; this is the Argument. "What we say from that"—(that is, after he has stated the municipal legislation and the derivative title under Russia)—"is that all the territorial jurisdiction of the United States acquired from Russia is included within the jurisdiction of the Alaska Court, and is equally within the limitation of section 1956, and that if rights were acquired in Behring Sea by the cession from Russia—and no rights were otherwise acquired—that section 1956 extends over all the territory or dominion which was acquired by that treaty of cession. We do not deny that the jurisdiction of the District Court of Alaska and that the venue of the offence were originally questions to be decided by that Court, and to be decided by this Court in a proper case when properly here raised. What we assert is that the jurisdiction of that Court, and the venue of the offence, by a single step is made inevitably to depend upon the national jurisdiction in the waters of Behring Sea: that that is a polit-

ical question, and that the decision of the Executive and of the Congress of the United States on that political question is conclusive, not only upon this Court but upon every citizen within the jurisdiction of the country, because in determining that political question the Executive is discharging his constitutional functions, and he, in the discharge of that duty, is not an inferior tribunal whose decision may be reversed by this Court."

The Court will see that it could not have been present to the mind of this learned gentleman that there was any ground put forward suggesting a defensibility of the judgment, except the ground of national territorial jurisdiction, on which he affirms are based the only rights put forward by the United States, and which he says were the only rights that were acquired from Russia by the United States. The Attorney-General follows, but follows briefly upon the same lines; and I turn to the judgment, and (Mr. Justice Harlan will correct me if I am wrong about this) I take the effect of the judgment ultimately to be this; that the Court thought that it was not a case in which a Prohibition lay; that they came to the conclusion that the Record had been so imperfectly made up that even if jurisdiction did not extend beyond 3 miles, yet *non constat*, as far as the Record as made up appeared, the offence may not have been committed within 3 miles.

Mr. Justice HARLAN.—I really do not recall enough of it to say whether you are correct or not. Have you the opinion of the Court?

Sir CHARLES RUSSELL.—Yes; I have it before me.

I do not know if the other Members of the Court appreciate what I am upon. Jurisdiction in prohibition is a peculiar thing. It is difficult to put prohibition in force after the judgment has passed. The point resolves itself into a question whether the Court had any jurisdiction; and, if it had any jurisdiction, then the remedy if the Court has gone wrong is not prohibition, but appeal. If it had jurisdiction, you cannot prohibit; and the Court came to the conclusion, from the Record
866 put before them, imperfectly and very badly made up it would appear, that it did not appear that the seizure might not have been within the 3-mile limit, and, therefore, properly within the jurisdiction, as internationally recognized, of the municipal Courts.

But that is not the point I am upon, which is the recognition by the Court of the argument of the Solicitor-General on the broad grounds on which the United States assumed to justify their action. The judgment is on page 16 of the Official Report—

Mr. Justice HARLAN.—That is the opinion of the Chief Justice?

Sir CHARLES RUSSELL.—Yes.

If we assume that the record shows the locality of the alleged offence and seizure as stated, it also shows that officers of the United States, acting under the orders of their Government, seized this vessel engaged in catching seal and took her into the nearest port, and that the law officers of the government libelled her and proceeded against her for the violation of the laws of the United States, in the District Court, resulting in her condemnation?

How did it happen that the officers received such orders? It must be admitted that they were given in the assertion on the part of this government of territorial jurisdiction over Behring Sea to an extent exceeding fifty-nine miles from the shores of Alaska; that this territorial jurisdiction, in the enforcement of the laws protecting seal fisheries, was asserted by actual seizures during the seasons of 1886, 1887, and 1889, of a number of British vessels; that the government persistently maintains that such jurisdiction belongs to it, based not only on the peculiar nature of the seal fisheries and the property of the government in them, but also upon the position that this jurisdiction was asserted by Russia for more than 90 years, and by that government transferred to the United States; and that negotiations are pending upon the subject.

Therefore, the Chief Justice appreciates it in the same sense; he could not do otherwise.

That the government persistently maintains that such jurisdiction belongs to it, based not only on the peculiar nature of the seal fisheries and the property of the government in them, but also upon the position that this jurisdiction was asserted by Russia for more than ninety years.

The PRESIDENT.—What does he mean by "extending 59 miles", that is where the seizure was, I suppose?

Sir CHARLES RUSSELL.—Yes As regards the technical ground of the Judgment he says on page 28:

Upon the face of the libel and findings, if the jurisdiction did not extend beyond three miles from the shore, the legal inference is that the offence and seizure were within that limit.

That is the technical ground, but not the broader ground which I am at present upon.

Now if it were, as it is apparent it must be, the true meaning that the jurisdiction exercised by Russia was territorial dominion, then I have to show that the United States admit now at this stage of the controversy that the question must be answered in the sense for which Great Britain contends. Now I proceed to justify that state-
867 ment, and for that purpose I refer to the Case of the United States. Now in order to bring this out, in order to contrast the different aspects of their contention, it is enough to say that in the original Case their propositions were these. I am reading now from the "Conclusions" at page 297:

That prior to the Treaty of 1825 between Great Britain and Russia, and from a date as early as 1799, down to the cession to the United States in 1867, Russia prohibited the killing of seals in any of the waters of Behring Sea, and exercised such control therein as was necessary to enforce such prohibition.

Fifth. That Behring Sea was not included in the phrase Pacific Ocean, as used in the Treaty of 1825, and that said Treaty recognized the rightfulness of the control exercised by Russia in Behring Sea for the protection of seals.

Sixth. That all the rights of Russia as to the protection of the Alaskan seal herd passed unimpaired to the United States by the Treaty of 1867—

and so on.

Then the final conclusions, at the bottom of page 301, are these:

In conclusion the United States invoke the judgment of this High Tribunal to the effect:

First. That prior and up to the time of the cession of Alaska to the United States, Russia asserted and exercised an exclusive right to the seal fisheries in the waters of Behring Sea, and also asserted and exercised throughout that sea the right to prevent by the employment, when necessary, of reasonable force any invasion of such exclusive right.

That Great Britain, not having at any time resisted or objected to such assertions of exclusive right, or to such exercise of power, is to be deemed as having recognized and assented to the same.

Then in another form is repeated the Behring Sea and Pacific Ocean question; and then finally it is stated that the rights of Russia passed to the United States.

Now their present position is stated briefly on page 19 of their Counter-Case. The marginal note to that column is this: "No exclusive territorial jurisdiction claimed;" and the statement in the body is in these words:

The distinction between the right of exclusive territorial jurisdiction over Behring Sea, on the one hand, and the right of a nation, on the other hand, to preserve for the use of its citizens its interests on land by the adoption of all necessary, even though they be somewhat unusual, measures, whether on land or at sea, is so broad

as to require no further exposition. It is the latter right, not the former, that the United States contend to have been exercised, first by Russia, and later by themselves.

Therefore, it follows from this statement that it is not a question of exclusive jurisdiction in the sea, because exclusive jurisdiction in the sea means, as I pointed out on a previous occasion, a jurisdiction exclusive of all other Powers—a right to say to all other Powers and persons "You shall not enter here if it is our will that you shall not enter here". That is sovereign jurisdiction; it involves treating the area to which that assertion relates as if it were territory, because, as I pointed out on a previous occasion, such a right as the one which is now asserted, to defend a special property interest, is not a right exercisable in a
868 defined area; it is a right which, if it exists—(whether it exists and what its true character is I will discuss hereafter)—would exist and be exercisable wherever the property to be defended existed and at the time was. It, therefore, would have no local area of circumscription at all.

But, further, let me draw the attention of the Arbitrators to the form of question 4:

Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea, east of the water boundary in the Treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that Treaty?

The Tribunal will notice those words "pass unimpaired". That is clearly referring to a right of jurisdiction, a right of territorial jurisdiction; because how could it be suggested that if it is a right of protection of property, incident to property, there could be any question of that being impaired?

Such a right would come into existence when the right itself came into existence, and would exist as long as the right itself existed. There could be no question of a derivative title to protection in the property if it existed at all; or of its passing unimpaired. Therefore, that question again throws light on what the meaning of the first of these three questions is, namely, an assertion of territorial sovereignty by the United States. That it was exclusive jurisdiction in a limited area, and not a general right which follows property wherever it is, is further shown by the *modus vivendi*. The *modus vivendi* stipulates that if the result of the Arbitration be to affirm the right of British sealers to take seals in Behring Sea, then the United States is to compensate Great Britain; if, on the other hand, the result of the Arbitration should be that Great Britain has no right to take seals in Behring Sea, then that Great Britain is to compensate the United States for this loss; again showing jurisdiction in a limited area—jurisdiction in the eastern part of Behring Sea. Now it is important for us to follow this out, (although it is, in the view of my learned friends, no more than a subordinate question), because it shows that which I must again and again and again refer to and recur to—that the claim of the United States is essentially a territorial claim, and because it shows also that the whole area of dispute between these parties, (which is the limitation, as we contend, of the authority of this Tribunal), is limited to the area of Behring Sea.

There is one other general observation which I have to present, and then I pass on. It will be observed that the third question deals specifically with the point raised by Mr. Blaine in his celebrated letter of December 17, 1890, which he said, if decided in one way, was conclusive of the question: namely, whether Behring Sea was included in the phrase "Pacific Ocean". I observe on that in passing, that if that

question is answered in the sense for which we contend, namely, that Behring Sea was included in the phrase "Pacific Ocean" in the treaties, then all the first four questions are answered in the sense
869 favorable to Great Britain; because if, by the operation of the Treaties, Russia did in fact recognize, without qualification, rights of fishing in Behring Sea, then it cannot be said that she asserted and exercised exclusive rights, when by the Treaties she had disclaimed them. I hope the Tribunal follows this point. If the effect of the Treaties is to recognize the right of Great Britain and its nationals, as well indeed as of other Powers of the world, to navigate and fish without limitation in Behring Sea, then of course Russia cannot be said to have asserted and exercised a right which is inconsistent with that recognition.

Now with those observations I pass to the consideration of the matter a little more closely. In considering these questions I do not forget the observation "cutely" made, if I may respectfully say so, by Senator Morgan, a good many days ago, namely that it is not a question what rights Russia had in fact, but that it is what rights Russia asserted and exercised. That is quite true; but, of course, in considering what rights Russia did, in fact, assert and exercise, it is not unimportant to consider, in a very general way, what would have been the effect and the character of the assertion of any such right, and what was the extent of the locality, the extent of the area, in which those rights of an exclusive kind were said to have been exercised. Now upon this part of the case I can be very brief. I will not trouble the Tribunal to refer to the documents for the moment. It will not be found to be necessary even to supplement in any way the admirable, graphic, picturesque, introductory historical sketch which my friend, Mr. Carter, gave the Tribunal in his argument—a very interesting part indeed of his argument.

There were some statements in the course of that narration with which we do not agree, but there is nothing essential to the question between us. The Behring Sea is the northern part of the Pacific Ocean; it washes the north-west portion of the coast of America and changes its name at the sea of Okhotsk. In the extreme west it washes the north-eastern part of Asia.

Description of Behring Sea.

It is the sea that connects the broad Pacific Ocean with the Arctic Ocean by the Behring Straits, some 48 miles in width. From east to west that sea—it is before your eyes upon the map—has an extreme width of 1,260 miles. From north to south it extends over 14 degrees of latitude, exceeding 800 miles; and the area of that sea is stated in the United States Case (and I have no doubt quite correctly) to amount to nearly 900,000 square miles. That is the character of the sea. Prior to 1799 it is perfectly true to say that it was one of the vast and partially unexplored seas of the world. It had begun to be navigated by all nations, but not to a very large extent. There had been Russian, American, English and French travellers over various parts of the bordering country. The general description of these expeditions is to be found in the historical outline which is presented in the British Case from pages 14 to 21.

I do not stop to read them, because it is not important, but by the beginning of the 19th century undoubtedly, the regions in this
870 neighbourhood, and the regions of land beyond—in the almost practically unknown Arctic ocean,—had excited the interest and the desire for exploration in the adventurous among men: *omne ignotum pro magnifico.* Eyes were turned on these undiscovered regions. The country both south and east of Behring Sea being very sparsely popu-

lated, and almost entirely by the aboriginal population, it had not assumed any great commercial value as a pathway of commerce. There had been no important settlements on the American coast, and the questions of what right Russia had acquired by discovery, or by possession, were of a largely indeterminate character. That, broadly stated, was the position of things when the Ukase of 1799 was promulgated by Russia.

THE UKASE OF 1799.

Upon this Ukase I must say a word, although again it is not necessary to trouble the Tribunal by referring to any particular document in relation to it. Legislation by Ukase I take to be the mode which the Constitution, or the system of Government I had perhaps better say, of Russia, employs for conveying its sovereign will. That Ukase of 1799 has, I think been a little misstated by my friends on the other side. Its history is given in the British Case; the Ukase itself is on page 25. I may dispose of it as far as I am concerned by very general observations. In truth this Ukase was aimed at consolidating the rival Russian interests concerned in the trade in the Russian possessions upon the American coast. It was not directed against foreigners—indeed there were very few foreigners against whom it could be directed at that time. It shows that it was aimed at consolidating local Russian interests in one powerful monopoly; which one powerful monopoly should, by its strength and its own inherent force be able to resist possible competition, signs of which were beginning to grow up. In that sense undoubtedly it was aimed at foreigners, but in that sense only.

Now it begins by a statement of the claim of Russia by right of discovery; and then it goes on, in clause 1, to say:

> We most graciously permit the company to have the use of all hunting grounds and establishments now existing on the north-eastern—

that ought to be *north western*—

> coast of America from the above-mentioned 55th degree to Behring Strait and on the same also on the Aleutian, Kurile, and other islands situated in the north-eastern ocean.

Clause 2 relates to making new discoveries, which I need not read. The remaining important clauses are as follows:

> 3. To use and profit by everything which has been or shall be discovered in those localities, on the surface and in the bosom of the earth, without any competition by others.
>
> 5. To extend their navigation to all adjoining nations and hold business intercourse with all surrounding powers under our highest protection to enable them to prosecute their enterprises with greater force and advantage.
>
> 871 6. To employ for navigation, hunting, and all other business, free and unsuspected people—

and so on.

> 8. For shooting animals, for marine signals, and on all unexpected emergencies on the mainland of America and on the islands, the Company is permitted to buy for cash at cost price, from the Government artillery magazine at Irkutsk, yearly so many pouds of powder—

and so on.

> 10. The exclusive right most graciously granted to the company for a period of 20 years, to use and enjoy, in the above described extent of county and islands, all profits and advantages derived from hunting, trade, industries, and discovery of new lands prohibiting the enjoyment of those profits and advantages not only to those who would wish to sail to those countries on their own account, but to all former hunters and trappers.

Now this is the chief passage which I desire to read in order to show what the purport of the article was; it is in the middle of article 10.

And other companies which may have been formed will not be allowed to continue their business unless they unite with the present company with their free consent; but such private companies or traders as have their vessels in those regions can either sell their property, or, with the company's consent remain, until they have obtained a cargo—

and so on. Then further on it says:

And after that nobody will have any privileges but this one Company, which will be protected in the enjoyment of all the advantages mentioned.

That therefore was the creation of a Russian Monopoly Company, which should have all rights of trade in the territories which Russia either possessed or was claiming to possess by its right of discovery. It applied to all other Russian subjects—excluded all other Russian subjects; but there is not a word about foreigners in it from beginning to end. But that is not the most important part. The Tribunal will observe that there is not one syllable about the sea in it, and not one word about exclusive rights of fishing in Behring Sea.

Mr. Justice HARLAN.—Sir Charles, will you let me remind you here that in the British Counter-Case it is said that the translation you have just read is incorrect, and you gave another translation of it which you say is the correct literal one. I want to ask you, is there any material difference.

Sir CHARLES RUSSELL.—None, sir, I believe.

Lord HANNEN.—Only in one phrase I think, in which the word "dominion" is used.

Mr. Justice HARLAN.—The differences are indicated in the Counter-Case by italics. I do not know whether there is any proof in the documents as to which is the correct translation.

Sir RICHARD WEBSTER.—It arose in this way. This translation was simply taken from Bancroft's History of Alaska. The original Ukase had never been translated till after the British Case was deposited, and then it was translated for greater accuracy, and that more correct translation was printed. As the Attorney General said, there are no substantial differences which require any notice.

872

Sir CHARLES RUSSELL.—I think it will be found that is so. As I have already observed, it is domestic in its character, and indeed affirms a strong domestic monopóly which could successfully contend with other rivals, and in that sense undoubtedly with foreign rivals, if they appeared; and it relates solely to land. It has no reference to the question of sea rights, or of interference with sea rights. It is entirely domestic in its character, and there is no suggestion of a notification to any foreign Power.

It will be seen, at the bottom of page 28 of the Case, that the view I am suggesting is the view which prevailed in 1824 in the United States. Referring to the Ukase of 1799, Mr. Middleton, writing to Mr. John Quincy Adams, says:

The confusion prevailing in Europe in 1799 permitted Russia (who alone seems to have kept her attention fixed upon this interest during that period) to take a decided step towards the monopoly of this trade, by the Ukase of that date, which trespassed upon the acknowledged rights of Spain.

That is as regards territory, you will recollect.

But at that moment the Emperor Paul had declared war against that country as being an ally of France. This Ukase, which is, in its *form*, an act purely domestic, was never notified to any foreign State with injunction to respect its provisions,

Accordingly, it appears to have been passed over unobserved by foreign powers, and it remained without execution in so far as it militated against their rights.

That was the United States view of it.

THE UKASE OF 1821.

Now, I pass to the much more important document, the Ukase of 1821, and the Tribunal will observe that, at this period, the question of seal-fishing, either on Islands or in the open sea, had not assumed any importance. No doubt, the natives along the coast had been catching all they could for their clothing and for their sustenance, and no doubt barter had begun to spring up as early as that period, though it would be mainly south of the Aleutian Chain, but we have no record of any existing, to any extent, north of the Aleutians. Now comes this important document, the Ukase of 1821, which is set out in volume I of the Appendix to the United States Case, at page 16:

Edict of his Imperial Majesty, Autocrat of all the Russias.

The Directing Senate maketh known unto all men. Whereas in an Edict of his Imperial Majesty, issued to the Directing Senate on the 4th day of September, and signed by his Imperial Majesty's own hand, it is thus expressed:

'Observing from reports submitted to us that the trade of our subjects on the
873 Aleutian Islands and on the northwest coast of America appertaining into Russia, is subjected, because of secret and illicit traffic, to oppression and impediments; and finding that the principal cause of these difficulties is the want of rules establishing the boundaries for navigation along these coasts, and the order of naval communication as well in these places as on the whole of the eastern coast of Siberia and the Kurile Islands, we have deemed it necessary—'

and so forth.

Now, before I proceed to read the operative parts of this document, may I invite the attention of the Tribunal seriously to my learned friend Mr. Carter's contention in relation to this Ukase, and the effect of that Ukase upon the Treaties of 1824 and 1825; because it will save me a good deal of repetition and argument if the Tribunal will bear in mind that the whole of the discussion in which I am now embarking will be addressed not merely to showing that the right of fishing was recognized in the Behring Sea, but also to showing that the phrase "northwest coast of America" had not the limited meaning in the Treaties and in the correspondence which my learned friend, Mr. Carter, assigned to it, but extended to the whole of the coast-line of the possessions claimed by Russia from Behring Strait down to its most southern boundary.

In order that the Tribunal may have this point more clearly before it, let me remind the Tribunal what my friend Mr. Carter's argument was. The argument was that north of the Aleutian Chain in Behring Sea, and north of Behring Sea, the rights of Russia never were questioned at all—that the debatable ground was not reached until you came south of the Aleutians.

Mr. CARTER.—South and east.

Sir CHARLES RUSSELL.—Oh yes, of course.

Mr. CARTER.—Not much south.

Sir CHARLES RUSSELL.—South and east of the Aleutians; but that south and east of the Aleutians Russian pretensions were met by certain more or less undefined claims on the part of Great Britain, and by certain more or less undefined claims to territory on the part of the United States: that all the dispute related to portions of sea and territory south of the Aleutian chain; and that the north west-coast—and this is the main point—in the sense in which it was used in the Ukase,

in the sense in which it was used in the Treaties, referred only and strictly to the *lisière*, as ultimately defined in the Treaty of 1825. Now having stated that correctly as my learned friend's contention, I do not stop to point out, though I may have to do it later, that my learned friend has given one of four different interpretations which have been advanced by the United States as to the meaning of that phrase "northwest coast". It will be convenient for me here to mention what those four interpretations were. I will not stop to justify this assertion now; but I think it will be apparent when I come to read the correspondence.

Mr. CARTER.—I referred to the limitation of the words "northwest coast" as used in the Ukase.

874 Sir CHARLES RUSSELL.—Very well; I am obliged to my learned friend for correcting me; as used in the Ukase, it was much more.

Mr. CARTER.—I did not say that.

Sir CHARLES RUSSELL.—If it was not confined to the *lisière*, it extended beyond it, and, therefore, meant more than the *lisière*.

Mr. CARTER.—I only spoke of what my argument was.

Sir CHARLES RUSSELL.—I now point out what these four constructions were. In the despatch to Sir Julian Pauncefote of the 30th of June, 1890, Mr. Blaine examined the Treaties of 1824 and 1825, and says it is plain that they both limited the "northwest coast" to the coast between the 50th and 60th degrees of North latitude.

[Sir Richard Webster then pointed it out on the map.]

On the 17th of December, 1890, he again writes, and discusses the meaning of "Pacific Ocean" and "the Northwest coast"; and he observes in that letter that the dispute as to the meaning of "Pacific Ocean" prominently involves the meaning of "the Northwest coast"; and, in that letter he contends that "the Northwest coast" means the coast from the 42nd to the 60th degrees of North latitude.

[Sir Richard Webster then pointed it out on the map.]

I observe, in passing, that neither of those contentions has been thought worth inserting in the United States Case or Counter-Case.

A third construction suggested is that it is identical with the *lisière*.

The fourth construction is put forward in the United States Case at page 26, where they say that the term "Northwest coast" is intended to designate the coast between Prince William's Sound and the mouth of the Columbia River.

[Sir Richard Webster then pointed it out on the map.]

Those four meanings have been given by the United States to that phrase "Northwest coast".

Now, I will ask the attention of the Tribunal to what it really means.

I agree fully with Mr. Blaine that the two phrases "Northwest coast" and "Pacific Ocean" have a very important bearing indeed on the question whether Behring Sea was not included in the phrase "Pacific Ocean". First of all, of course, it is important to see, inasmuch as the Treaties of 1824 and 1825 were the result of the protests, up to a certain point joint, and after that separate, of the United States and of Great Britain it is important, of course, to see what was the assertion, on the part of Russia, of jurisdiction against which these protests were jointly and severally made. I turn to the Ukase.

It is set out on page 16 of volume I of the Appendix to the United States Case.

Rules established for the limits of navigation and order of communication along the coast of Eastern Siberia, the Northwest Coast of America, and the Aleutian, Kurile and other islands.

If the Tribunal will follow this on the map, it will be seen
875 that that describes a circle. It is made still clearer in section I. "The pursuits of commerce, whaling and fishery",—you will observe that, though my friends say that this Ukase was for the protection of fur-seals, there is no reference in it to fur-seals at all; but there is a reference to other forms of fishing.

The pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports and gulfs including the whole of the northwest coast of America, beginning from Behring's Straits to the 51° of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South Cape of the Island of Urup, namely, to the 45°50 northern latitude, is exclusively granted to Russian subjects.

Again, the Tribunal will see that the whole line of that coast is indicated by the general description of Russian assertion of dominion. On the western side of the Behring Sea, and on the coast of Siberia, from Behring Straits along the coast down to 45°50 of latitude; on the American side from Behring Straits to 51° of northern latitude, described as the "northwest coast of America". Now that is unmistakeable.

It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia as stated above, but also to approach them within less than a hundred Italian miles. The transgressor's vessel is subject to confiscation along with the whole cargo.

Now, let me point out, Mr. President, when my learned friends say the Treaties of 1824 and of 1825 left Behring Sea untouched, and that Behring Sea was not included in the phrase "Pacific Ocean," that if it was untouched, so far as Behring Sea is concerned, it must have been a closed sea, a *mare clausum:* because there is no opening into Behring Sea from the south or from the north that exceeds 200 miles. You will find, on page 47 of our Counter-Case, the exact width of all the passes is given, and the greatest pass is that between Attu Island and Copper Island, which is 190 miles only. If the jurisdiction is extended 100 miles from each of the Islands, the two zones, of course, meet, and the sea becomes a *mare clausum.*

I do not think there is a great deal to be said in calling attention to the details of the Rules issued with this Ukase, but there are two or three to which I must refer. Section 3 requires to be noticed.

Mr. Justice HARLAN.—The Cases of both Governments agree in the translation of section 1 which you have read; but I observe that in a letter of Mr. Blaine to Sir Julian Pauncefote, at page 226 of the United States Appendix, volume I, he gives sections 1 and 2 of the Ukase of 1821; and it differs from the one you have read. I do not know where he got his translation. There seems to be no reference to it anywhere.

Sir CHARLES RUSSELL.—Does it materially differ?

Mr. Justice HARLAN.—Well, there is some change of phraseology. Instead of the words "including the whole of the northwest coast of America", it reads "and in general, all along the north-western coast
of America". The translation you have read contains the words
876 "from the Aleutian Islands to the eastern coast of Siberia", while Mr. Blaine's translation reads, "on the Aleutian Islands and along the eastern coast of Siberia."

Sir CHARLES RUSSELL.—I do not know where he got it from. It does not seem very important.

Mr. Justice HARLAN.—No; I do not know that it is.

Sir CHARLES RUSSELL.—It would seem to put it rather stronger: "And, in general, all along the north-western coast of America from Behring Strait." It is stronger, but not material; but I take the trans-

lation that the United States have put forward themselves. I am reminded by my learned friend that we have put forward one which agrees with it.

Mr. Justice HARLAN.—Exactly. Both Governments have presented the same translation in the present case.

Sir CHARLES RUSSELL.—So I understand.

I was calling attention to section 3, which shows there is no doubt about what was meant in section 1; namely, the power of excluding every body from the area in sections 1 and 2, because in section 3 an exception is made.

In favour of vessels carried thither by heavy gales or real want of provisions, and unable to make any other shore but such as belongs to Russia. In these cases they are obliged to produce convincing proofs of actual reason for such an exception. Ships of friendly governments merely on discoveries are likewise exempt from the foregoing rule.

Then section 14, on page 18:

It is likewise interdicted to foreign ships to carry on any traffic or barter with the natives of the islands, and of the northwest coast of America, in the whole extent hereabove mentioned. A ship convicted of this trade shall be confiscated.

Then, section 25 I do not know that that is very important to trouble you with; but it is:

In case a ship of the Russian Imperial Navy, or one belonging to the Russian American Company, meet a foreign vessel on the above-stated coasts, in harbours, or roads, within the before-mentioned limits, and the Commander find grounds by the present regulation that the ship be liable to seizure, he is to act as follows—

And then there are indications as to how he is to act. Then I pass over several pages, and in section 60 more or less elaborate provisions are made for dealing with the proceeds of confiscated property, vessels and cargo, as to which four-fifths are to go, after certain deductions, to the American Company. The President will recollect that the American Company was not an American Company with American citizens in it; it was so called from its trading partly in America; and so far from being an American Company, the papers state, and I think it is correct, that a number of distinguished persons in Russian political life, including members of the Royal Family, were interested in that Company.

There can be no question, Mr. President, between us as to what
877 that Ukase means. It means an assertion of exclusive territorial dominion in the territory mentioned to the extent mentioned and in the seas mentioned, so as to prohibit navigation within 100 miles from the coast. That is a very different thing from the charter of 1799, which was not communicated to any foreign Power. This Ukase was—

Mr. Justice HARLAN.—You say "to the extent mentioned." Do you mean over the whole of Behring Sea, or for 100 miles?

Sir CHARLES RUSSELL.—So far as territorial jurisdiction is concerned, 100 miles from the land and the islands, of course. But as I have pointed out this would have closed the entrance to Behring Sea. The Charter of 1821 you will find on page 24. It is not necessary that I should trouble you with it beyond reading sections 1 and 2. The Ukase was an act of imperial legislation. The Charter is the act by which, upon the basis and under the protection of that imperial legislation, the rights are given to the chartered Company.

The Company established for carrying on industries and trade on the mainland of north-west America, on the Aleutian, and on the Kurile Islands, remains as heretofore under the highest protection of His Imperial Majesty.

It enjoys the privilege of hunting and fishing to the exclusion of all other Russian and foreign subjects throughout the territories long since in the possession of Russian, on the coasts of north-west America, beginning at the northern point of the island of Vancouver in latitude 51° north, and extending to Behring Strait and beyond, as well as on all islands adjoining this coast and all those situated between this coast and the eastern shore of Siberia, as well as on the Kurile Islands, where the Company has engaged in hunting down to the south cape of the Island Urupa, in latitude 45° 50′.

Sir RICHARD WEBSTER.—The translations there do not quite agree, but it is sufficiently accurate in the United States Case.

Sir CHARLES RUSSELL.—Now, still endeavouring not to distract the attention of the Tribunal by references to too many books, I would ask you to turn to page 132 in this same volume. How far have we got in the argument? We have got clearly to the point of a distinct assertion of territorial dominion of a very extended kind by Russia, and of territorial jurisdiction of an exclusive character, extending 100 miles from land and from the islands; which is of course a claim to exclude all persons from that extended area.

Nature of the claim made in the Ukase of 1821.

The PRESIDENT.—You seem to construe the last clause of the Ukase of 1821 as implying an extension by Russia of the territorial limit.

Sir CHARLES RUSSELL.—Yes and so it was.

The PRESIDENT.—Not of particular jurisdiction, but as an extension of general territorial right of Russia.

Sir CHARLES RUSSELL.—Certainly there is a distinct prohibition of any vessel going inside that line, with the penalty of being confiscated if it does go within: with the only exception in favour of a vessel blown within by accident or stress of weather. It is a claim to exclude all persons from coming within that limit. It is an extension to 100 miles of the now universally accepted 3 miles limit.

878 Lord HANNEN.—I understood you to say you thought the effect of it would be to prevent any vessel going into Behring Sea at all because they would infringe the 100 miles.

Sir CHARLES RUSSELL.—Yes I did. There is the permission given, which does not detract from the assertion of territorial dominion, to a ship on a voyage of discovery.

The PRESIDENT.—Yes and with passports.

Sir CHARLES RUSSELL.—And a further exception if a ship is blown in by stress of weather. Now that is a serious and grave assertion of rights of sovereignty of Russia; and if after having been notified to foreign Powers, including Great Britain and the United States, they had acquiesced in it, and had made no objection to it, then possibly a case of estoppel or acquiescence by them might have been made out.

Senator MORGAN.—Then, if I understand you, there seems to be no controversy between the parties here as to the fact that Russia asserted exclusive jurisdiction in Behring Sea.

Sir CHARLES RUSSELL.—Undoubtedly, and then withdrew it.

Senator MORGAN.—There is a question then as to the withdrawal?

Sir CHARLES RUSSELL.—Certainly: our position is that they asserted it on paper, never exercised it, and then withdrew it. Mr. Senator Morgan asked me whether he was to take it that both United States and Great Britain agreed that Russia asserted this territorial dominion in Behring Sea. I said, yes; I understood the other side also agreed in that.

Mr. CARTER.—No.

Sir CHARLES RUSSELL.—I thought it was so.

Mr. CARTER.—What may be the effect of the Ukase is one thing, but what Russia intended by it is another. She did not intend in our view to assert exclusive jurisdiction; that is disavowed.

Sir CHARLES RUSSELL.—At all events, I may repeat the remark which I just made—that Russia did assert territorial sovereignty, but that she asserted it only on paper; that she never exercised it; and, that, by the Treaty, she disclaimed it. That is the answer which I make to Senator Morgan. I may point out now that whereas we state the greatest distance between the islands at 190 miles, my friends put the distance at 205 miles.

Lord HANNEN.—Is that the difference between the Pribilof Islands and the Aleutian Chain?

Sir CHARLES RUSSELL.—No.

Lord HANNEN. I thought it was.

Sir CHARLES RUSSELL.—It is between "Attu Island," and the "Commander Islands". At the same time I may point out that that does not make any difference, because they say at the beginning of their Case, that unless otherwise stated all measurements are given in English statute miles. The English statute mile is 1,760 yards; but the Italian mile of the Ukase is the same as a geographical mile, which is about 2,000 yards; so that practically there is no importance in the difference of measurements.

879 Lord HANNEN.—At page 16 the United States Case speaks of the Pribilof Islands. It says:

> It is of volcanic origin and far removed from other land, the nearest adjacent points being Unalaska Island, at a distance of two hundred and fourteen miles to the southward.

That is the distance of the Pribilof Island group.

Sir CHARLES RUSSELL.—That is quite right my Lord; that is another passage.

Lord HANNEN.—It would be a curious coincidence if that should be stated to be 214 miles in both of the cases.

Sir CHARLES RUSSELL.—The other is 205.

Lord HANNEN.—Yes, I beg your pardon.

Sir CHARLES RUSSELL.—The distance from Attu to the Commander Islands is stated to be 205 statute miles.

Lord HANNEN.—As a matter of fact, I took some steps to ascertain the exact distance and I believe it is 175 miles from Attu Island to the Commader Islands.

Sir RICHARD WEBSTER.—We put it at 195 miles, and they say it is 205. It is not a matter of any importance.

[Sir Richard Webster indicated the position on the map.]

Sir CHARLES RUSSELL.—I have said, here is a broad and bold assertion of sovereignty by Russia. If Great Britain and the United States had acquiesced in that assertion, then there might have been possible grounds for putting forward a claim grounded upon acquiescence, or, as lawyers would call it, upon estoppel against the acquiescing or consenting Powers. How did they act? First of all, how did the United States Government act? I have referred you to page 132 of the correspondence, in Appendix to the United States Case, Volume I and on that page is to be found Mr. Quincy Adams's letter of the 25th of February, 1822, in which he says:

Protest of United States.

> I am directed by the President of the United States to inform you that he has seen with surprise in this edict the assertion of a territorial claim on the part of Russia, extending to the 51st degree of north latitude on this continent, and a regulation

interdicting to all commercial vessels other than Russian, upon the penalty of seizure and confiscation the approach upon the high seas within 100 Italian miles of the shores to which that claim is made to apply.

There is nothing more in that letter which I need read, except at the top of page 133, where you will find this sentence:

To exclude the vessels of our citizens from the shore beyond the ordinary distance to which the territorial jurisdiction extends has excited still greater surprise. This ordinance affects so deeply the rights of the United States.—

And so on. Now M. de Poletica does not shrink from the assertion of what his case is, and at page 133 of volume I of the Appendix to the Case of the United States is his letter in which he says boldly.

I shall be more succinct, Sir, in the exposition of the motives which determined the Imperial Government to prohibit foreign vessels from approaching the north west coast of America—

880 You will observe the use of this phrase:

belonging to Russia within the distance of at least 100 Italian miles. This measure, however severe it may at first appear, is after all but a measure of prevention. It is exclusively directed against the culpable enterprises of foreign adventurers who, not content with exercising, upon the coasts above mentioned, an illicit trade, very prejudicial to the rights reserved entirely to the Russian-American Company, take upon them besides to furnish arms and ammunition to the natives in the Russian possessions in America, exciting them likewise in every manner to resist and revolt against the authorities there established.

I pause for one moment. You will observe that he speaks there of "the exposition of the motives" which have prompted this. I want to point out that my learned friend, in treating of what was the effect of this legislation of Russia, has confounded motive with effect. It may well be that my friend is quite right in saying that the motive which the Russian Government had was to protect this trade and commerce, and these interests, on the coasts. That might have been its motive; but its legislation took the form of an assertion of territorial sovereignty to the extent which I have mentioned. Then M. de Poletica goes on to say:

The American Government doubtless recollects that the irregular conduct of these adventurers, the majority of whom was composed of American citizens, has been the object of the most pressing remonstrances on the part of Russia to the Federal Government from the time that diplomatic missions were organized between the two countries.

Then a little lower down he says:

Pacific means not having brought any alleviation to the just grievances of the Russian American Company against foreign navigators in the waters which environ their establishments on the north-west coast of America, the Imperial Government saw itself under the necessity of having recourse to the means of coercion, and of measuring the rigour according to the inveterate character of the evil to which it wished to put a stop.

He then proceeds:

I ought in the last place to request you to consider, Sir, that the Russian possessions in the Pacific Ocean extend on the North-west coast of America from Behring Sea to the 51st degree of north latitude, and on the opposite side of Asia, and the islands adjacent, from the same strait to the 45th degree.

The Tribunal will remember that in the Ukase of 1799 the claim was only made to the 55th degree.

Then M. de Poletica proceeds:

The extent of sea of which these possessions form the limits, comprehends all the conditions which are ordinarily attached to *shut seas* (mers fermées) and the Russian Government might consequently judge itself authorized to exercise upon this sea

the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights, without taking any advantage of localities.

That is he says in effect:—This is a shut sea: We are entitled to treat it as a shut sea: We are entitled to treat the whole expanse of Behring Sea as a territory in the sense of excluding from that
881 every person whom we choose not to admit; but we limit our practical assertion to 100 Italian miles from the coast".

Now how is this met?

Mr. Justice HARLAN.—Does he mean to apply the phrase "shut seas" only to Behring Sea?

Sir CHARLES RUSSELL.—I do not affirm that he does.

Mr. Justice HARLAN.—I. thought you said Behring Sea just now. That was the reason I asked you.

Sir CHARLES RUSSELL.—I think he extends it even more widely than to Behring Sea. That makes my position, of course a stronger one. I think you are right, Sir.

How does Mr. Adams meet this? I turn to page 134, at the third paragraph, after stating the nature of the pretension he says:

This pretension is to be considered not only with reference to the question of territorial right, but also to that prohibition to the vessels of other nations, including those of the United States, to approach within 100 Italian miles of the coasts. From the period of the existence of the United States as an independent nation, their vessels have freely navigated those seas, and the right to navigate them is a part of that independence.

With regard to the suggestion that the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea, because it claims territory both on its American and Asiatic shores, it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, is not less than 90° of longitude, or 4,000 miles.

There, no doubt, Mr. Adams was speaking of a wider expanse of the ocean.

As little can the United States accede to the justice of the reason assigned for the prohibition above mentioned. The right of the citizens of the United States to hold commerce with the aboriginal natives of the northwest coast of America—

I beg attention to this adoption of this phrase "northwest coast". We have seen how the phrase was used by M. de Poletica. Mr. Adams is adopting it, and he says:

The right of the citizens of the United States to hold commerce with the aboriginal natives of the Northwest Coast of America without the territorial jurisdiction of other nations—

That means outside the territorial jurisdiction—

even in arms and munitions of war, is as clear and indisputable as that of navigating the seas, etc.

That right has never been exercised in a spirit unfriendly to Russia, etc.

On the next page, M. de Poletica replies:

In the same manner the great extent of the Pacific Ocean at the fifty-first degree of latitude can not invalidate the right which Russia may have of considering that part of the ocean as close. But as the Imperial Government has not thought fit to take advantage of that right, all further discussion on this subject would be idle.

Then I do not think I need trouble you with that. But after that comes a very important communication from Mr. Middleton, who
882 was the Minister of the United States at St. Petersburgh, to Mr. Adams, Secretary of State at Washington; and it will be seen that once this bold assertion on the part of Russia was met face to face, the operation—if I may use it in relation to a great Power of whom I

desire to speak with all possible respect—the operation known as "climbing down" began, as you will see, from this very letter. He says on page 136:

To Mr. Speransky, Governor General of Siberia, who had been one of the committee originating this measure, I stated my objections at length. He informed me that the first intention had been (as Mr. Poletica afterwards wrote you) to declare the northern portion of the Pacific Ocean as *mare clausum*—

I ask my friends, can there be any doubt what the "northern portion of the Pacific Ocean" there meant, can there be any doubt that it included Behring Sea?—

but that idea being abandoned, probably on account of its extravagance, they determined to adopt the more moderate measure of establishing limits to the maritime jurisdiction on their coasts, such as should secure to the Russian American Fur Company the monopoly of the very lucrative traffic they carry on. In order to do this they sought a precedent, and found the distance of 30 leagues, named in treaty of Utrecht, and which may be calculated at about 100 Italian miles, sufficient for all purposes.

I need not say that what was once done by Treaty is no justification for what has been done without Treaty.

I replied ironically that a still better precedent might have been pointed out to them in the papal bull, of 1493, which established as a line of demarcation between the Spaniards and Portuguese a meridian to be drawn at the distance of 100 miles west of the Azores, and that the expression "Italian miles" used in the ukase very naturally might lead to the conclusion that this was actually the precedent looked to. He took my remarks in good part, and I am disposed to think that this conversation led him to make reflections which did not tend to confirm his first impressions, for I found him afterwards at different times speaking confidentially upon the subject.

For some time past I began to perceive that the provisions of the ukase would not be persisted in. It appears to have been signed by the Emperor without sufficient examination, and may be fairly considered to have been surreptitiously obtained. There can be little doubt, therefore, that with a little patience and management it will be molded into a less objectionable shape. But in this, as in other matters, the *revocare gradum* is most difficult. Since the receipt of your dispatch No. 12, I have had several conferences with the secretaries of state, and we have discussed fully and freely *the state of the question* as left by Mr. Poletica with your letter unanswered in his pocket. . . . . .

I informed him that I intended to ask a formal interview with Count Nesselrode before his departure, for the purpose of taking up this subject and urging some decision upon it, as I never had been able to ascertain officially whether the offensive provisions of the ukase would be revoked. I felt the more anxious, too, because I had learned that a Russian Frigate was shortly to sail for the N. W. Coast. I informed him further that I had prepared a *note verbale* to leave with Count Nesselrode, which I begged to be permitted to read to him (Count Capodistrias), as I was well assured of his anxious desire that all things should go on smoothly between us. (See paper No. 1.)

After hearing this paper with attention he said to me: "Puisque vous me faites l'honneur de me consulter, je vous dirai franchement mon avis. Si vous voulez que la chose s'arrange, ne donnez point votre note—L'Empereur a déjà eu le bon
883 esprit de voir que cette affaire ne devrait pas être poussée plus loin. Nous sommes disposés à ne pas y donner de suite. Les ordres pour nos vaisseaux de guerre seront bornés à empêcher la contrebande dans les limites reconnues par les autres puissances, en prenant nos établissements actuels pour base de ces opérations. De cette manière, il n'y aura pas de complication pour entraver la négociation que pourra entamer M. le Baron de Tuyll dès son arrivée à Washington. Si vous dites que vous faites protestation, vous ferez du tort à la négociation; il ne faut pas non plus faire l'insinuation que nous ayons avancé une injuste prétention, même en nous complimentant sur notre politique passée; il ne faut pas nous sommer de révoquer des ordres donnés; nous ne révoquons pas; nous ne rétractons pas. Mais dans le fait il n'y a pas d'ordres donnés qui autorisent ce que vous craignez".

Therefore, even at that stage, in 1822, the year after the Ukase was promulgated, and when the matter is being discussed between politicians, we find the Emperor's representatives saying that the jurisdiction will not be exercised.

Then the letter goes on:

At that conference I talked over the matter with the two secretaries of state, and brought fully to their view the substance of the instructions upon the ukase of 4th September last, insisting upon the necessity of this Government suspending the execution of those regulations, which violate the general right of navigating within the common jurisdiction of all nations, and declaring that the territorial pretension advanced by Russia must be considered as entirely inadmissible by the United States.—

Then follows the *note verbale*, which I need not trouble you with, because the effect of it has already been disclosed in that discussion.

We may now proceed further. On page 141 is an important despatch from Mr. Adams to Mr. Middleton of the 22nd of July, 1823?

WASHINGTON, *July 22, 1823.*

SIR: I have the honor of inclosing herewith copies of a note from Baron de Tuyll, the Russian minister, recently arrived, proposing, on the part of His Majesty the Emperor of Russia, that a power should be transmitted to you to enter upon a negotiation with the ministers of his Government concerning the differences which have arisen from the Imperial ukase of 4th (16th) September, 1821, relative to the northwest coast of America, and of the answer from this Department acceding to this proposal. A full power is accordingly inclosed, and you will consider this letter as communicating to you the President's instructions for the conduct of the negociation.

From the tenor of the ukase, the pretentions of the Imperial Government extend to an exclusive territorial jurisdiction from the forty-fifth degree of north latitude, on the Asiatic coast, to the latitude of fifty-one north on the western coast of the American continent——

You see that is describing the circle I have mentioned—

and they assume the right of interdicting the navigation and the fishery of all other nations to the extent of 100 miles from the whole of that coast.

The United States can admit no part of these claims.

I pause simply to put one question. Can any document be referred to in which the United States ever receded from that position? There is the distinct statement of the Secretary of State to the Minister at St. Petersburgh—

884 The United States can admit no part of these claims.

Their right of navigation and of fishing is perfect, and has been in constant exercise from the earliest times, after the peace of 1783, throughout the whole extent of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions, which, so far as Russian rights are confined to certain islands north of the fifty-fifth degree of latitude, and have no existence on the continent of America.

The correspondence between Mr. Poletica and this Department contained no discussion of the principles or of the facts upon which he attempted the justification of the Imperial ukase. This was purposely avoided on our part, under the expectation that the Imperial Government could not fail, upon a review of the measure, to revoke it altogether. It did, however, excite much public animadversion in this country, as the ukase itself had already done in England. I inclose herewith the North American Review for October, 1822, No. 37, which contains an article (p. 370) written by a person fully master of the subject; and for the view of it taken in England I refer you to the fifty-second number of the Quarterly Review, the article upon Lieutenant Kotzebue's voyages. From the article in the North American Review it will be seen that the rights of discovery, of occupancy, and of uncontested possession, alleged by Mr. Poletica, are all without foundation in fact.

I have next to call your attention to page 142, on which will be found an able argument by Mr. Adams directed mainly to the question of the territorial limits claimed as regards the Southern boundary, etc.

Next follows a justification of the traffic that was carried on by United States citizens: a defence of that traffic as not being clandestine, etc.

Then, on page 143, the last paragraph but two, after referring to

the statement that the traffic was unlawful and irregular, Mr. Adams continues:

It is necessary now to say that this impression was erroneous; that the traffic of the citizens of the United States with the natives of the north-west coast was neither *clandestine*, nor unlawful, nor irregular; that it had been enjoyed many years before the Russian American Company existed, and that it interfered with no lawful right or claim of Russia.

This trade has been shared also by the English, French, and Portuguese. In the prosecution of it the English settlement of Nootka Sound was made, which occasioned the differences between Great Britain and Spain.—

Of course it is quite right to say that that trade was mainly a trade to the south of the Aleutian Chain, and in that great bight south of the Aleutian Chain.

Then he proceeds, at the top of page 144, to justify the claim of the United States from the 42nd to the 49th parallel of latitude on the Pacific Ocean. I do not think it is important that I should trouble you with that. But enclosed in that letter was a suggestion for an agreement that would meet the difficulty:

ARTICLE I.

In order to strengthen the bonds of friendship and to preserve in future a perfect harmony and good understanding between the contracting parties it is agreed that their respective citizens and subjects shall not be disturbed or molested, either in navigating or in carrying on their fisheries in the Pacific Ocean or in the South Seas, or in landing on the coast of those seas, in places not already occupied, for the purpose of carrying on their commerce with the natives of the country; subject, nevertheless to the restrictions and provisions specified in the two following articles.

885 ART. II.

To the end that the navigation and fishery of the citizens and subjects of the contracting parties, respectively, in the Pacific Ocean or in the South Seas, may not be made a pretext for illicit trade with their respective settlements, it is agreed that the citizens of the United States shall not land on any part of the coast actually occupied by Russian settlements, unless by permission of the governor or commander thereof, and that Russian subjects shall, in like manner, be interdicted from landing without permission at any settlement of the United States on the said northwest coast.

ART. III.

It is agreed that no settlement shall be made hereafter on the northwest coast of America by citizens of the United States or under their authority, north, nor by Russian subjects, or under the authority of Russia, south of the fifty-fifth degree of north latitude.

Is it not absurd—I am not putting it too strongly—to suggest even that the Behring Sea was excluded from that: that when we speak of the "Northwest Coast", which has been again and again referred to, which is used in the original Ukase, which is used in the Charter, which is used in the correspondence without limitation, to say that that northwest coast, forsooth, is a bit of the coast south of the Aleutian Chain, and stops there? Of course one may take too sanguine a view of these matters, but I do submit that that narrower contention is absurd, and quite inconsistent with the tenor of these documents and this correspondence.

Mr. Justice HARLAN.—Sir Charles, what effect on that view would the words near the top of page 144 have, in the letter which enclosed the memorandum, which are: "The right of the United States from the forty-second to the forty-ninth parallel of latitude on the Pacific

Ocean we consider as unquestionable"? Was not that strip of land in the mind of Mr. Adams?

Sir CHARLES RUSSELL.—I do not myself see, Sir, that in this connection it would have any effect at all.

Sir RICHARD WEBSTER.—The area from latitude 42° to 49°, is that enclosed piece (indicating it on the map).

Mr. Justice HARLAN.—He was contending that the United States had the right unquestionably to go to 49?

Sir CHARLES RUSSELL.—Yes.

Mr. Justice HARLAN.—When he submitted along with that letter this draft of a Treaty; the question I was directing the attention of counsel to was whether, when speaking of the Northwest Coast of America, he is not referring to the part which the United States claimed.

Sir CHARLES RUSSELL.—No Sir. Why should he be referring to that? He is stating, so far as that part is concerned, what is the territorial limit of the coast claimed by the United States. So far as the United States were concerned, as between them and Great Britain, the northern boundary of their possessions on that northwest coast
886 had not been fixed. You, of course, Sir, are aware of that. It was a matter in dispute how far, in succession to the rights of Spain, the American title went along that northwest coast. That was a bit of the northwest coast, I admit. All that coast right up to the Behring Straits is a part of the northwest coast of the continent of America; but there is no limitation; and that meaning I think is made clear by the Article 2. It is in effect saying, "So far as there are Russian possessions, the Americans shall not land where there are establishments; and so far as there are American possessions on that northwest coast, Russians shall not land where there are American establishments." That is what the effect of it is, evidently.

Mr. Justice HARLAN.—Do you remember what the evidence says—I have forgotten—upon the question as to what country had possessions on the eastern shore of Behring Sea at that time and in what is now Alaska?

Sir CHARLES RUSSELL.—Undoubtedly, only some Russian settlements.

Lord HANNEN.—Only one Russian settlement, where there were three men and four women, or something of that kind.

Sir CHARLES RUSSELL.—Yes.

Mr. Justice HARLAN.—There were no settlements, then, practically, by any country on that shore.

Sir CHARLES RUSSELL.—No.

Senator MORGAN.—How many settlements on the Siberian coast were there at that time?

Sir CHARLES RUSSELL.—We have no evidence, of course, as to that. Siberia, as I pointed out the other day, stood in a different position to Russia from Alaska. Siberia was part of the realm of Russia. The persons who were there were Russians. There may have been an aboriginal population there, so far as I know. I do not know. So far as Alaska was concerned, it was treated as a colony of Russia.

The Tribunal here adjourned for a short while.

Sir CHARLES RUSSELL.—In reference to the question of Russian settlements north of the Aleutians, I would refer the Tribunal to page 42 of vol. I of the Appendix to the British Case. I do not think it is necessary to trouble the Tribunal now to do more than take a note of it. I simply make this observation. It will be there found that the only

Russian settlement north of the Aleutian chain was at a place called Nushagak. The population was not considerable. There were three Russian males and two Russian females. Nushagak is in Bristol Bay, which is an indentation in the coast-line north of the Aleutian peninsula. That is where the only settlement was.

THE UNITED STATES TREATY OF 1824.

I now proceed with the correspondence, which is rapidly drawing to a close. I pointed out the suggestion made by Mr. Quincy Adams
887 in that important despatch of the 22nd July 1823, and I may pass over the intervening correspondence and come to the question of the Treaty itself. The Treaty itself, Mr. President, will be found on page 35 of the same Volume with which I have been dealing. I do not stop to do more than to recall the broad assertion of sovereign jurisdiction made by Russia in the Ukase of 1821, and in the Charter of 1821, and now side by side with that we have the Treaty:

It is agreed that in any part of the great Ocean commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the high contracting powers shall be neither disturbed nor restrained, either in navigation or in fishing or in the power of resorting to the coasts upon points which may not already have been occupied for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles.

I do no more than ask this question. Is it possible, in view of the assertions made by Russia, in view of the statements of Mr. Quincy Adams that no part of that claim can be admitted by the United States, in view of the fact that from that position the United States never departed, to contend that from this Treaty is to be excluded the whole of Behring Sea and the coasts of the territory abutting upon Behring Sea? We submit with all deference that that is an impossible and absurd contention.

ARTICLE II. With a view of preventing the rights of navigation and of fishing exercised upon the Great Ocean by the citizens and subjects of the high contracting Powers from becoming the pretext for an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian establishment, without the permission of the governor or commander; and that, reciprocally, the subjects of Russia shall not resort without permission, to any establishment of the United States upon the Northwest coast.

ARTICLE III. It is moreover agreed that, hereafter, there shall not be formed by the citizens of the United States, or under the authority of the said States, any establishment upon the northwest coast of America, nor in any of the islands adjacent, to the north of 54 degrees and 40 minutes of north latitude; and that in the same manner there shall be none formed by Russian subjects, or under the authority of Russia south of the same parallel.

Can it be suggested that that was restricted; and that when the phrase "Northwest coast" is mentioned there, it did not mean that no establishment along any part of that northwest coast should be made north of 54° 40′: and, in the same way as regards American territory, none should be made by Russian subjects south of that point?

Then comes Article IV:

It is, nevertheless, understood that during a term of ten years, counting from the signature of the present Convention, the ships of both Powers, or which belong to their citizens or subjects respectively, may reciprocally frequent, without any hindrance whatever, the interior seas—

we are dealing here with territorial waters, entrance to which is limited to the ten years—

gulfs, harbours, and creeks, upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country.

888 What is the ground for restricting that to a portion only of this north-west coast?

Article III has dealt with the formation of establishments, and has said that one Power shall not form a fresh establishment north of a particular point in Russian territory, and that the other Power shall not form a fresh establishment south of a particular point on the United States territory. And then Article IV, passing away from the subject of establishments, deals with the question of fishing and trading with the natives of the country, and provides that there shall be a reciprocal right: to the citizens of the United States along the whole coast which belongs to Russia, and reciprocally there shall be the right of the Russian people along the whole coast which belongs to the United States.

The PRESIDENT.—Is there evidence that the United States took advantage of this article to trade with the natives of the coast?

Sir CHARLES RUSSELL.—Yes.

The PRESIDENT.—Inside Behring Sea?

Sir CHARLES RUSSELL.—No, apparently at that time there was no inducement to go inside Behring Sea.

Senator MORGAN.—I suppose the fur-seals were in there then, were they not?

Sir CHARLES RUSSELL.—Yes, fur-seals were in Behring Sea, I presume, from time immemorial. I do not know, but they probably were, so far as we know. Up to this time the fur-seals had not assumed any position of importance, either as regards Russian enterprise or the enterprise of any other people.

General FOSTER.—They had taken over 3,000,000 of skins.

Sir CHARLES RUSSELL.—I will deal with that in a moment. The observation is a little irregular, and I must ask you to restrain your impatience. Mr. Foster has made an interjection, Sir, which it is perhaps irregular to notice, in which he says that there were a large number of skins got. I do not know the evidence he refers to, but I have no difficulty in saying that, as regards the fur-seals on the Pribilof Islands, they had not assumed any importance as regards the supply of skins. The islands were discovered in 1786, I think, and in Japan and on the Commander Islands we know there was trading, but I do not recollect that there was any such extent of dealing with fur-seals on the Pribilof Islands. I will not refer to the interruption further, but if my learned friend will give me the reference, I will deal with it at a later stage. As a matter of fact, it stands thus. There were no settlements at the time of this Treaty north of the Aleutians, except the one I have mentioned at Nushagak. Obviously, therefore there would be very little interest—motive of interest is perhaps the best way of putting it—to go trading in the Behring Sea; but the point is not, with very great deference, whether the United States used the power—they did at a later period use it for whaling and to a considerable extent in Behring Sea after this; the question of the President was addressed only to dealings with natives.

889 The PRESIDENT.—Yes, under Article IV.

Sir CHARLES RUSSELL.—Yes: there was, in fact, as I have said, only one settlement, and there would be comparatively little interest or motive to attempt such trading at that time; but as regards the free navigation of Behring Sea for the purposes of whaling, which was then considered a profitable industry, the United States did undoubtedly pursue that industry in the Behring Sea.

The difficulty that my learned friends have to meet is this. Article III specifies the northwest coast of America to the north of 54° 40′, which is the southern limit of Russian possessions, and extends without any limitation whatever to the north; and when Article IV is framed it refers to the coast mentioned in the preceding Article without any limitation. Therefore in the later article (to the limit and extent of the northwest coast in the preceding article) it obviously extends to the whole of the north-west coast right up to the Behring Straits. I think that is all I have to say upon the subject of the Treaty: except to read, from page 30, Volume I of the Appendix to the British Counter-Case, a passage in a communication made by Count Nesselrode in a letter dated the 11th of April, 1824, only six days after the date of the Treaty. It is a considerable communication, and I may tell the Tribunal that this was written apparently with the object of allaying the apprehensions and toning down the objections of the Commercial Company, as to the view that they should take of the effect of this Treaty of 1824 upon their interests. The revised translation is in the right hand column.

In Article III—that is of this Treaty—the United States recognize the sovereign power of Russia over the western coast of America, from the Polar Seas to 54° 40′ of north latitude; while we on our part promise not to found Settlements below this parallel, as a matter of course only in those places, and without extending this provision to the Colony of Ross, far distant to the south.

Then at the bottom of the page:

In Article IV we allow the American States, though for no longer than ten years, to trade and fish in places within our dominions.

There it is stated without any qualification whatever; and this is written, as I say, six days after the Treaty; it extends without any qualification the whole way up; and the importance of Article IV is that it gives a temporary advantage to the United States—that is to say, it gives to United States subjects rights of access to interior seas, to gulfs, to harbours, and to creeks, all of which, or the greater part of which, would be in strictly territorial waters; and, therefore, to which, upon the general rule of international law, the United States would not have any right of access at all.

The PRESIDENT.—Was this diplomatically communicated to other Powers? Did it come from the United States Minister, or where is it taken from?

Sir CHARLES RUSSELL.—The explanation is given on page 28. It is a letter from Count Nesselrode to Nicholas Semenovitch, and I
890 gather from the communication that this gentleman was interested in the American Commercial Company, and that it was written with a view of allaying the apprehension of, or justifying the Treaty to, that gentlemen: that is the object of it.

The PRESIDENT.—You are not aware how the British Government came into possession of that document.

Sir CHARLES RUSSELL.—Not at the moment.

The PRESIDENT.—It is not of much importance, but I should to know if it had any international value.

Sir RICHARD WEBSTER.—I think it is one of the documents which came to light when the annexation to the United States took place. This is the correct translation by the United States of that document.

The PRESIDENT.—The purport of my question was, whether the United States were officially apprised of the existence of this document and of this interpretation. That is the point of my question.

Sir CHARLES RUSSELL.—I am not able to say that they had it officially.

The PRESIDENT.—At all events they had the document in their hands.

Sir CHARLES RUSSELL.—Yes, they had the document in their hands.

Senator MORGAN.—Those documents came over to the United States, I take it, to be deposited among the archives with reference to the Alaskan regions.

Sir CHARLES RUSSELL.—I should judge the case to be this: that when the cession of 1867 was effected all the documents that related to the Alaskan territory were handed over as being necessary for the archives; and I should say that that was the probable explanation.

The PRESIDENT.—Yes.

Sir CHARLES RUSSELL.—Now let me make one other comment before I pass from this Treaty.

The Tribunal will observe that neither in the Ukase, nor in the Charter under the Ukase, is any special reference made to any particular kind of fishing beyond the statement as to *whaling*, which word is used in Section 1 of the Ukase: "pursuits of commerce, whaling and fishery and of all other industry in all islands", and so forth. There is no indication therefore of any special kind of fishing.

There is nothing for instance about sea-otters or fur-seals, nor any other kind of animal or any special kind of fish. The only one is whaling, which I presume was a matter of more or less importance. And therefore, when in Article 1 of the Treaty it is said in express terms that the subjects of neither Contracting Party shall be disturbed or restrained in navigation or in fishing or in resorting to the coast, and so on, I need not say that that is a recognition of the mutual rights as to fishing, without any limitation of any kind or character either as to the mode of fishing or the objects to which that fishing is addressed. It is absolute and unqualified.

Now one other word: A distinction of course is to be drawn between different parts of this Treaty. The United States will not say, 891 they have not said, they cannot correctly say, that Article 1 *gave* them a right. That is not the position so far as the general rights of navigation and fishing in the open sea are concerned.

The Treaty of 1824 did not confer that right on the United States. It recognized a right. The position of the United States in the language of Mr. Quincy Adams was this:—We can admit *no part* of the claim of Russia, and therefore the true position is this, that Article 1 of the Treaty of 1824, just as in the Treaty of 1825, at which I have not yet arrived, does not *confer* the right, but is merely the *recognition* of the right; and therefore withdraws all the pretensions inconsistent with that right which were advanced in the Ukase and by the Charter.

When we come to Article IV, the case is different; because as regards Article IV something is given which is not a right, apart from Treaty, either of the United States on the one hand or of Russia on the other, because it gives the right of frequenting the interior seas, gulfs, harbours, and creeks on the coasts mentioned, all those pointing to territorial waters which neither Russia nor America could frequent in the territories of the other as of right.

Now, I leave that Treaty altogether, with one small exception, namely the argument which my learned friend, Mr. Carter, greatly to my surprise, based upon the conversation between Baron de Tuyll and Mr. Adams on the eve of the signature of the Treaty. I say which my learned friend advanced greatly to my surprise; I sup-

The Baron de Tuyll incident.

pose he advanced it because it had already been advanced in the argument of Mr. Blaine in one of his letters; but my surprise at my learned friend advancing it is because, when looked at, it is the strongest confirmation of the construction of the Treaty of 1824 on which we are insisting. What had happened? The Trading Company was, apparently, alarmed that there might be some restriction of those rights, as indeed there were. The Company was composed of influential persons. It had construed the Treaty in the sense in which we are construing it, and they wanted to see whether, before it was actually signed, there might not be something which, as regards the effect upon them and their rights under the Charter, might not be mitigated. Accordingly, we have that very interesting record at page 263 of Volume I of the Appendix to the United States Case, the passage in question being at page 276. This is the long letter of the 17th of December, 1890, from Mr. Blaine to Sir Julian Pauncefote.

Baron Tuyll, the Russian Minister, wrote me a note yesterday requesting an immediate interview, in consequence of instructions received yesterday from his Court. He came, and after intimating that he was under some embarrassment, [very naturally] in executing his instructions, said that the Russian-American Company, upon learning the purport of the Northwest Coast Convention concluded last June by Mr. Middleton, were extremely dissatisfied (*a jeté de hauts cris*), and, by means of their influence, had prevailed upon his Government to send him these instructions upon two points. One was that he should deliver, upon the exchange of the
892 ratifications of the Convention, an explanatory note purporting that the Russian Government did not understand that the Convention would give liberty to the citizens of the United States to trade [where?] on the coast of Siberia and the Aleutian Islands. The other was to propose a modification of the Convention by which our vessels should be prohibited from trading on the northwest coast north of latitude 57°.

You observe, therefore, that he was to explain the Russian meaning as to the liberty of the citizens of the United States to trade on the coast of Siberia and the Aleutian Islands. What was the other point?

To propose a modification of the Convention, by which our vessels should be prohibited from trading on the northwest coast North of latitude 57° [you see, a modification.] With regard to the former of these points he left with me a minute in writing.

With this preliminary statement, Baron Tuyl, in accordance with instructions from his Government, submitted to Mr. Adams the following note:

EXPLANATORY NOTE FROM RUSSIA.

Explanatory note to be presented to the Government of the United States at the time of the exchange of ratifications, with a view to removing with more certainty all occasions for future discussions; by means of which note it will be seen that *the Aleutian Islands, the coasts of Siberia, and the Russian Possessions in general on the Northwest Coast of America to* 59° 30′ *of north latitude* are positively excepted from the liberty of hunting, fishing, and commerce stipulated in favour of citizens of the United States for ten years.

Therefore, you observe that Baron de Tuyll and his friends, the American Company behind him, read the Treaty as we have been contending that Treaty can only be read, as giving the liberty of visit for ten years to the whole of the northwest coast; and this is his argument. He says:

This seems to be only a natural consequence of the stipulations agreed upon, for *the coasts of Siberia* are washed by the Sea of Okhotsk, the Sea of Kamschatka, and the Icy Sea, *and not by the South Sea* mentioned in the first article of the Convention of April 5–17 (1824). *The Aleutian Islands* are also washed by the Sea of Kamschatka, or Northern Ocean.

It is not the intention of Russia to impede the free navigation of the Pacific Ocean. She would be satisfied with causing to be recognized, as well understood and placed beyond all manner of doubt—

My learned friend did not read this; probably he accidentally overlooked it—

the principle that beyond 59° 30′ no foreign vessel can approach her coasts and her islands, nor fish nor hunt within the distance of two marine leagues.

My learned friend did not read that passage.

Mr. CARTER.—I think I did.

Sir CHARLES RUSSELL.—No, I think not; indeed, I am sure not, because I noted it at the time. The assertion amounts to this:

The interpretation we put upon it is the interpretation the Commercial Company have been putting upon it, and we propose this alteration; not to insist on the 100 miles, but we shall be content with two marine leagues, that is to say, keep outside the territorial waters, only let us extend the territorial waters not to one but to two marine leagues.

893 Senator MORGAN.—That is the first time I think I have heard in any paper of the distinction drawn between fishing and hunting, that is, two marine leagues from land; what could they hunt two marine leagues from land?

Sir CHARLES RUSSELL.—I suppose, though I do not defend the accuracy of the language of Baron Tuyl—I suppose that you might say, not improperly, that you hunted a whale, that you hunted a sea-otter, or that you hunted a fur-seal.

Senator MORGAN.—I mean, you would not say that you hunted for halibut or codfish.

Sir CHARLES RUSSELL.—No; I should say you fish for them, but you, sir, are quite as good a judge of language in that respect as I or anybody else.

Senator MORGAN.—I mean, it is a point on the construction of the Treaty, that there was a distinction made between hunting and fishing, and that the right reserved by Russia, or rather, the United States, of whaling and other fisheries did not include perhaps the right to hunt seals, or to hunt sea-otters.

Sir CHARLES RUSSELL.—My respectful answer to that would be, Sir, Where is there a trace of such a reservation?

Senator MORGAN.—I mean, if there is such a thing.

Sir CHARLES RUSSELL.—There is nothing. Let me call the attention of the learned Arbitrator to the fact that in the Ukase or in the Charter under the Ukase, which refers to any special kind of fishing or of hunting, the expression is: "The pursuits of commerce, whaling, and fishery, and of all other industry", and so on,—that is what is asserted. I would submit this point to the learned Senator: if the Company were to get the right of hunting fur-seals exclusively within 100 miles of the coast, it was to get it under this Ukase, or under the Charter, or not at all. Under the Charter it enjoys the privilege of hunting and fishing to the exclusion of all other Russian or foreign subjects throughout the territories long since in the possession of Russia.

Senator MORGAN.—Will you allow me for one moment? They have the privilege of hunting and fishing mentioned; but the question is whether they gave up in the Treaty of 1824 and of 1825 the right of hunting and fishing, or only the fishing?

Sir CHARLES RUSSELL.—With great deference, I think the fallacy, if I may say so, is that the word is primarily applied to the hunting of animals of land, and the Company, under this Charter, had great privileges, admittedly within the power of the Russian Emperor to grant, of hunting on that land and over large tracts of land. That is not touched, and the Treaty is silent upon any question of grant of Russian terri-

tory, because nobody can affect or control or limit the disposition of the Russian Government, or Legislature if there be one, as regards all within the territorial sovereignty; but, when you come to the question of the sea, the Treaty says the subjects of both Powers shall have
894 unrestricted rights of fishing in the South Sea, without any restriction or limitation, and, though I listen with the greatest deference to any suggestion coming from the Arbitrators, I fail to see what the difficulty is that really presses on the learned Senator's mind. We never contended that that Treaty gave the right of fishing in the open sea; we never contended that it conferred a right, but merely, by the recognition of the right, withdrew an unjust pretension which would have limited the right of the public to fish in the Sea.

It is clear that Baron Tuyll's objection went only to the extent of a limitation of the right of hunting and fishing within the distance of two marine leagues; and the use of the word "hunting" in that connexion clearly shows that he, at all events, was using "hunting" in a sense applicable to the sea, because "within two marine leagues of the shore" could of course, only be upon the sea; and all he was saying was: "You must not come and hunt or fish"—whatever the right phrase may be—"within two marine leagues". But that was not quite all. Mr. Adams, as one would expect from a statesman of his known ability, said "You need not be uneasy"—(and I think that answers the question which the learned President was good enough to put a minute or two ago)—"If you talk of these northern regions, you will be drawing the attention of our people to it. There is no great interest for them to go at present—it is not worth while making a point of it." But he says: "The Senate will agree to this Treaty. We have no power to depart from the Treaty. The Treaty must speak according to its natural effect, and therefore, to put it plainly and tersely, you must take it or leave it".

The Russian Government was anxious to take it, because they were then securing for the first time a recognition on the part of Great Britain and the United States of a distinct territorial sovereignty over a previously disputed territory, and therefore the Treaty passed, and is to be interpreted according to its meaning and the natural import of the words which are used in the Treaty itself.

I say therefore that so far from that Baron de Tuyl incident furnishing an argument against our contention, it is a circumstance most strongly significant of the fact that the American Company were taking the very view of the construction of the Treaty of 1824 which is the construction which we are now saying is the clear and indubitable one.

THE BRITISH TREATY OF 1825.

I pass now to the Treaty of 1825, and with regard to that Treaty I must begin by observing that if I have made my ground good as regards the Treaty of 1824, I stand in a position certainly as strong, probably stronger, when I come to consider the Treaty of 1825; because from beginning to end of the correspondence it will be found that that part of the assertion of Russia to which Great Britain most strongly objected
895 was the right of affecting and controlling free navigation and free rights in the open sea; and as will appear in the correspondence to which I will now call attention, the Government of Great Britain was not concerned about pressing the question of delimitation of territory upon the coast nearly so much as in pressing a settlement of the pretensions as regards maritime jurisdiction.

I ought indeed to have said in connection with the other subject, *particularly* the meaning of the north-west coast, that the position of

America in this regard was a little singular. The boundaries, as I said, between Russian territory on the coast and British territory, and United States territory, were to a large extent undefined. It was pretty clear—I do not think the United States ever suggested the contrary—that to some extent, at least, there would come in as a wedge between Russian territory on the north and United States territory on the south, some portion of British territory on the coast. The exact point was not defined or limited.

As I have said, the limit of the Russian claim to the south had been variously advanced by Russia. In the Ukase of 1799, they had only claimed to go down to 55°. In the Ukase of 1821, they had claimed to go down to 51°. The Arbitrators will recollect that. On the other hand, the exact point north to which the United States were prepared to press its just claims to territory had been left more or less undefined, and it was a matter of only indirect interest to the United States of what was to be the southern boundary of the Russian possessions. The more they could squeeze the Russian assertions of sovereignty on the coast further north, the greater chance it would give them of squeezing British territory further north, and so extend their own claims. It was only in that sense a matter of comparative importance to the United States what should be the southern boundary of the Russian possessions.

Now the correspondence, so far as Great Britain is concerned, is most conveniently set out in the 2nd volume of the Appendix to the British Case, and it is all collected there as far as I desire to use it. It begins with a letter from Baron Nicolay to the Marquess of Londonderry. This is a long letter and I do not think it is necessary I should trouble you by reading it in full. The fourth sentence begins:

Le nouveau règlement n'interdit point aux bâtimens étrangers la navigation dans les mers qui baignent les possessions Russes sur les côtes nord-ouest de l'Amérique et nord-est de l'Asie.

I merely read that to shew the extent to which it extends. Then it goes on:

D'un autre côté, en considérant les possessions Russes qui s'étendent, tant sur la côte nord-ouest de l'Amérique depuis le détroit de Behring jusqu'au 51° de latitude septentrionale——

It then proceeds to give the boundaries very much as in the correspondence of M. de Poletica with the United States which I have
896 already read. He then goes on to claim that it would entitle Russia to treat the sea as a closed sea and then he finally says.

Il s'est borné, au contraire, comme on a lieu de s'en convaincre par le règlement nouvellement publié, à défendre à tout batiment étranger, non seulement d'aborder dans les établissements de la Campagnie Américaine, comme dans la presqu'île du Kamtchatka et les côtes de la mer d'Okhotsk, mais aussi de naviguer le long de ces possessions et en général d'en approcher à une distance de 100 milles d'Italie.

On the top of the next page occurs another sentence which shews his apprehension of the meaning of the Pacific Ocean.

Car, s'il est démontré que le Gouvernement Impérial eût eu à la rigueur la faculté de fermer entièrement aux étrangers cette partie de l'Océan Pacifique qui bordent nos possessions en Amérique et en Asie——

unmistakeably referring to Behring Sea as part of the Pacific Ocean.

Now the Government of the King immediately took advice upon the matter, and Mr. Christopher Robinson, the then King's Advocate, was asked to express his opinion:

In obedience to your Lordship's directions I have the honour to report that it appears to be the object of this communication to obtain indirectly from his Maj-

esty's Government an acknowledgment of territorial rights which are assumed by Russia over a portion of sea that may become of great importance with reference to the trade of that part of the world, and the discoveries which are now directed to that quarter.

It is important to observe that he, a lawyer, at once sees that the assertion of the claim to exclude others from a definite area of the sea from the coasts, is an assertion of territorial sovereignty, and accordingly he, at once, so describes it. You will see he says on page 2 of the volume II of the Appendix to the Case of the British Government:

The communication indirectly asserts an exclusive right in the sovereignty "d'une mer fermée sur l'espace de mer, dont les possessions" (from Behring's Straits to 51° north, on the west coast of America, and 45° north on the coast of Asia) "forment les limites", and it proceeds to announce as a qualified exercise of that right the exclusion of all foreign ships, under pain of confiscation, from approaching within 100 miles of those coasts.

The extent of territory so assumed is much greater than is ordinarily recognized by the principles of the law of nations.

and so on.

Now the letter from Count Nesselrode to Count Lieven, on the next page, is practically the same. I think in every important respect it is the same as Baron de Nicolay's letter which I have already read, and therefore I forbear to trouble the Tribunal with it. Sir Charles Bagot was, at this time, the British Minister at St. Petersburgh, and he writes a letter on the 17th of November, beginning on the bottom of page 4, referring to his dispatch in which he transmitted the heads of the Ukase. I will not trouble the Tribunal with reading the whole of the letter, but the last passage but one is important:

When I found that the Ukase had been already communicated to your Lordship I abstained from entering with Count Nesselrode into any further discussion
897 of it, or inquiring of him, upon what grounds the 51st degree of north latitude (which, after the last Treaty between Spain and the United States, reduces the possessions of Great Britain to two degrees of latitude) had been now declared,—

that is to say, Great Britain was being squeezed between those two claims.

I believe for the first time, to be the boundary of the Russian dominion upon those coasts, but I have adverted to the novel principle involved in that Regulation of the Decree which dooms to confiscation all foreign vessels which may approach within 100 Italian miles of the Russian coasts, and I find that this extraordinary pretension has been adopted from, and is supposed to be justified by the XIIth Article of the Treaty of Utrecht.

Now I pass over a good many pages of the correspondence and come to page 12, where there is an important letter, from Lord Stowell, which my friend Mr. Carter read; and you will see that Lord Stowell regarded, as every lawyer must regard, the assertion of exclusive control over an area as an assertion of exclusive dominion, territorial dominion, over that area.

Now Lord Stowell begins by saying:

I have perused these papers and it appears to me to be unsafe to proceed to any controversial discussion of the proposed Regulations till it is shown that they issue from a competent authority founded upon an acknowledged title of territorial and exclusive possession of the portions of the globe to which they relate.

and so on. Then he proceeds in the 2nd paragraph to say:

The territories claimed are of different species—islands—portions of the continent—and large portions of the sea adjoining.

He was a lawyer of great learning, ability and authority; and he treats it as a claim of territorial dominion. Then he proceeds:

I know too little of the history of their connection with either islands or continents to say with confidence that such a possession has in this case been acquired.—

and so forth.

He then proceeds to discuss the question, which has merely an academic interest at the present stage of the controversy, as to how far the mere right of discovery without actual possession would give the right to territory, with which we need not now trouble; and he finally winds up by saying:

I content myself with observing upon the Regulations themselves that they are carried to an extent that appears very unmeasured and insupportable.

Then on page 13 there is a communication to the Board of Trade, from which I read a short extract, in order to point out that it refers to the fact of there being some trade with Great Britain in the Behring Sea.

Two British ships nearly about the same time that the above ship sailed for the coast of Japan sailed for the whale fishery on the northwest coast of America, we believe into Behring Straits.

We have no doubt if we are protected in a *fair* trade (not with China) and fishery in the North Pacific Ocean, that British enterprise will find some islands in that great ocean which may have been overlooked by the Russians and Americans,

and so forth.

Then at page 14 there is an important letter from Lord Lon-
898 donderry who was then Foreign Secretary of Great Britain. It is dated the 18th January 1822. This letter refers to the north western coast of America. The second paragraph begins thus:

This document, containing Regulations of great extent and importance, both in its territorial and maritime bearings, has been considered with the utmost attention, and with those favourable sentiments which His Majesty's Government always bear towards the acts of a State which His Majesty has the satisfaction to feel himself connected, by the most intimate ties of friendship and alliance; and having been referred for the report of those high legal authorities, whose duty it is to advise His Majesty on such matters.

The undersigned is directed, till such friendly explanations can take place between the two Governments as may obviate misunderstanding upon so delicate and important a point, to make such provisional protest against the enactments of the said Ukase as may fully serve to save the rights of His Majesty's Crown, and may protect the persons and properties of His Majesty's subjects from molestation in the exercise of their lawful callings in that quarter of the globe.

The undersigned is commanded to acquaint Count Lieven that it being the King's constant desire to respect, and cause to be respected by his subjects in the fullest manner, the Emperor of Russia's just rights, His Majesty will be ready to enter into amicable explanations upon the interests affected by this instrument, in such manner as may be most acceptable to His Imperial Majesty.

In the meantime, upon the subject of this Ukase generally, and especially upon the two main principles of claim laid down therein, viz, an exclusive sovereignty alleged to belong to Russia over the territories therein described, as also the exclusive right of navigating and trading within the maritime limits therein set forth, his Britannic Majesty must be understood as hereby reserving all his rights, not being prepared to admit that the intercourse which is allowed on the face of this instrument to have hitherto subsisted on those coasts, and in those seas, can be deemed to be illicit, or that the ships of friendly Powers, even supposing an unqualified sovereignty was proved to appertain to the Imperial Crown in these vast and very imperfectly occupied territories, could, by the acknowledged law of nations, be excluded from navigating within the distance of 100 Italian miles as therein laid down from the coast, the exclusive dominion of which is assumed (but, as His Majesty's Government conceive, in error) to belong to His Imperial Majesty the Emperor of All the Russias.

I have already pointed out the position which Mr. Quincy Adams took up: that the United States can admit no part of this claim. I

now call attention to the position which Lord Londonderry, representing Great Britain, took up; and I say, as I said in reference to the other assertion of the United States, that Great Britain never departed from that position.

Now on the next page, page 15, is a communication dated 19th February, 1822, from Mr. Stratford Canning who was then in Washington. Referring to an interview with Mr. Adams, he says:

Mr. Adams gave me to understand that it was not the intention of the American Cabinet to admit the claim thus notified on the part of Russia. His objection appears to lie more particularly against the exclusion of foreign vessels to so great a distance from the shore.

I have to point out that so far the southern boundary of Russian possessions is concerned, it had only the indirect interest for the United States that I have mentioned.

899 Then the attention of the Foreign Office is further drawn to the matter by the Hudson's Bay Company, on page 15. I need not read that.

On page 17 is an important memorandum by the Duke of Wellington, in these terms:

In the course of a conversation which I had yesterday with Count Lieven, he informed me that he had been directed to give verbal explanations of the Ukase respecting—

I ask the attention of the Tribunal to the language used—

the north-west coast of America.

Where is there any limitation to be found that the withdrawal of the Ukase was confined to the Ocean south of the Aleutians?

These explanations went, he said, to this, that the Emperor did not propose to carry into execution the Ukase in its extended sense. That His Imperial Majesty's ships had been directed to cruize at the shortest possible distance from the shore in order to supply the natives with arms and ammunition, and in order to warn all vessels that that was His Imperial Majesty's dominion; and that His Imperial Majesty had besides given directions to his Minister in the United States to agree upon a Treaty of Limits with the United States.

You see, Mr. President, this is very like the echo of the communication which Mr. Middleton records, not with Count Lieven, but with another Russian Minister, when he is informed that Russia cannot withdraw what has been done in the way of giving orders, but that he may rest assured that those orders will not be acted upon, and that the orders sent out will be only to exercise control within the limits recognized by international law.

The Duke of Wellington proceeds to say:

It appears here that this explanation when given will be very little satisfactory; and that at best it is only a verbal explanation of a written and published Ukase, the terms of which, however contrary to the law of Nations and protested against by us, must be the rule for our merchants and traders till we can obtain some document in writing which will alter it. This is the sense in which I propose to act at Vienna upon this part of the instructions, and it is desirable that I should be informed whether we have any claim to territory on the north-west coast of America, and what are the opinions and reasonings of the civilians upon the question of *dominion on the sea.*

This letter is clear and businesslike as one would have expected from the Duke of Wellington; and I need not remind the Tribunal that at this time, although the marine league limit had been pretty generally recognized, it certainly had not been so universally fixed and recognized as in later years.

Then he goes on:

The Russian Ministers will very probably assimilate their claim of dominion as thus verbally explained to the claim which we are supposed to have of dominion in the Narrow Seas, which it was attempted to bring into discussion at the Congress at Vienna in 1815. We avoided the discussion, and explained the practice of giving and receiving salutes prevailing in the British Navy in a manner satisfactory to all parties. But we never relinquished the claim of the dominion.

On the other hand, we have not recently claimed the dominion in a proclamation, and warned others not to approach it.

900 I now pass on to the letter from Mr. George Canning to the Duke of Wellington, which will be found at page 21. He says:

Your Grace is already in possession of all that has passed both here and at St. Petersburgh on the subject of the issue in September of last year, by the Emperor of Russia, of an Ukase indirectly asserting an exclusive right of sovereignty from Behring's Straits to the 51st degree of north latitude on the west coast of America, and to the 45th degree North on the opposite coast of Asia, and (as a qualified exercise of that right) prohibiting all foreign ships, under pain of confiscation, from approaching within 100 Italian Miles of those coasts.

He then alludes to the opinions of Lord Stowell, and of the Advocate General, and refers to the question of title founded on mere discovery and the point whether possession was necessary. I need not trouble you with that. Then follow some sentences which are important.

With respect to the other points in the Ukase which have the effect of extending the territorial rights of Russia over the adjacent seas to the unprecedented distance of 100 miles from the line of coast, and of closing a hitherto unobstructed passage, at the present moment the object of important discoveries for the promotion of general commerce and navigation, these pretensions are considered by the best legal authorities as positive innovations on the right of navigation. As such, they can receive no explanation from further discussion, nor can by possibility be justified. Common usage, which has obtained the force of law, has indeed assigned to coasts and shores an accessorial boundary to a short limited distance for purposes of protection and general convenience, in no manner interfering with the rights of others, and not obstructing the freedom of general commerce and navigation.

But this important qualification the extent of the present claim entirely excludes, and when such a prohibition is, as in the present case, applied to a long line of coasts, and also to intermediate islands in remote seas where navigation is beset with innumerable and unforeseen difficulties, and where the principal employment of the fisheries must be pursued under circumstances which are incompatible with the prescribed courses, all particular considerations concur, in an especial manner, with the general principle, in repelling such a pretension as an encroachment on the freedom of navigation, and the unalienable rights of all nations.

I have indeed the satisfaction to believe, from a conference which I have had with Count Lieven on this matter,—that upon these two points,—the attempt to shut up the passage altogether, and the claim of exclusive dominion to so enormous a distance from the Coast,—the Russian Government are prepared entirely to waive their pretensions. The only effort that has been made to justify the latter claim was by reference to an Article in the Treaty of Utrecht, which assigns 30 leagues from the Coast as the distance of prohibition. But to this argument it is sufficient to answer that the assumption of such a space was, in the instance quoted, by stipulation in a Treaty, and one to which, therefore, the party to be affected by it had (whether wisely or not) given its deliberate consent. No inference could be drawn from that transaction in favour of a claim by authority against all the world.

I have little doubt, therefore, but that the public notification of the claim to consider the portions of the ocean included between the adjoining coast of America and the Russian empire as a *mare clausum*, and to extend the exclusive territorial jurisdiction of Russia to 100 Italian miles from the coast, will be publicly recalled, and I have the King's commands to instruct your Grace further to require of the Russian Minister (on the ground of the facts and reasonings furnished in their despatch and its inclosures) that such a portion of territory alone shall be defined as belonging to Russia as shall not interfere with the rights and actual possessions of His Majesty's subjects in North America.

That is a statement which is I think accurate in point of law, and you will see that while it is emphatic and distinct in its opposi-
901 tion to the claim of exclusive dominion 100 miles from the coast,

it professes the willingness of the Government to enter into negotiations for the delimitation of the disputed territory.

On page 24 is a Confidential Memoir, which I need not read; I may say that it re-states the case in defence of the Ukase; claims that they might have treated the Northern part of the Pacific as a shut sea, and so forth; but that there are overtures for the settlement of the subject, and that the Russian Government does not desire to press the matter to the full extent.

The Duke of Wellington, having received that letter which I have read from Mr. Canning, writes to Count Lieven in these terms. I am reading from page 25:

We object to the ukase on the grounds:

1. That his imperial Majesty assumes thereby an exclusive sovereignty in North America of which we are not prepared to acknowledge the existence or the extent. Upon this point, however the Memorandum of Count Nesselrode does afford the means of negotiation, and my Government will be ready to discuss it either in London or St. Petersburgh whenever the state of the discussions on the other question arising out of the ukase will allow of the discussion.

The second ground on which we object to the Ukase is that His Imperial Majesty thereby excludes from a certain considerable extent of the open sea vessels of other nations.

We contend that the assumption of this power is contrary to the law of nations, and we cannot found a negociation upon a paper,

That is the Confidential Memoir which I have just referred to.—

in which it is again broadly asserted. We contend that no Power whatever can exclude another from the use of the open sea. A Power can exclude itself from the navigation of a certain coast, sea, etc., by its own act or engagement, but it cannot by right be excluded by another. This we consider as the law of nations, and we cannot negociate upon a paper in which a right is asserted inconsistent with this principle.

Nothing could be stronger than that. Then follows an incident in the process which I took the liberty of describing a little time ago—the process of climbing down; and I call attention expressly to the note from the Duke of Wellington. It is dated November 29th, 1822.

Since I wrote to you yesterday I have had another conversation with the Russian Ministers regarding the Ukase.

It is now settled that both the memorandums which I inclosed to you should be considered as *non avenus*, and the Russian Ambassador in London is to address you a note in answer to that of the late Lord Londonderry, assuring you of the desire of the Emperor to negociate with you upon the whole question of the Emperor's claims in North America, reserving them all if the result of the negociation should not be satisfactory to both parties.

Therefore the position was that the Confidential Memoir that I mentioned was considered as *non avenue*, and the matter was at large for negotiation.

Now on page 31 is an important memorandum to Mr. Canning from Count Lieven, who was then in London. It is the second passage I refer to,—it is in these words:

Avant de quitter Vérone, le Soussigné a reçu l'ordre de donner au Gouverne-
902 ment de Sa Majesté britannique une nouvelle preuve des dispositions connues de l'Empereur, en proposant à son Excellence Mr. Canning, principal secrétaire d'État de Sa Majesté Britannique pour les Affaires étrangères (sans que cette proposition puisse porter atteinte aux droits de Sa Majesté Impériale, si elle n'est pas acceptée), que de part et d'autre la question de droit strict soit provisoirement écartée, et que tous les différends auxquels a donné lieu le Règlement dont il s'agit, s'aplanissent par un arrangement amical fondé sur le seul principe des convenances mutuelles et qui serait négocié à Saint-Pétersbourg.

Then follows a long dispatch from Count Nesselrode to Count Lieven, which is to a large extent, indeed I think it is entirely conversant with

the question of the territorial claim. I think I am right in saying that there is nothing about the maritime jurisdiction portion of the claim.

I now may pass over a good many of these letters until I come to page 38, a despatch from Mr. George Canning, to Sir Charles Bagot:

SIR: I have the honour to inclose for your Excellency's information, the copy of a despatch received from His Majesty's Minister in America upon the subject of the Russian Ukase relating to the north-west coast of America, also of a letter from the Ship-owners' Society upon the same subject, and of a Memorandum of my reply to that letter.

Your Excellency will observe from Mr. Stratford Canning's despatch that the Government of the United States are desirous to join with that of His Majesty in bringing forward some proposition for the definitive settlement of this question with Russia.

We have no precise information as to the views of the American Government, Mr. Rush not having yet received any instructions upon the subject. It seems probable, however, that the part of the question in which the American Government is peculiarly desirous of establishing a concert with this country is that which concerns the extravagant assumption of maritime jurisdiction. Upon this point, it being now distinctly understood that Russia waives all her pretensions to the practical exercise of the rights so unadvisedly claimed, the only question will be as to the mode and degree of disavowal with which Great Britain and the United States might be respectively satisfied.

Upon this point, therefore, such a concert as the United States are understood to desire will be peculiarly advantageous; because, supposing the disavowal made, there is no disposition on the part of His Majesty to press hard upon the feelings of the Emperor of Russia, and it would certainly be more easy for His Majesty to insist lightly upon what may be considered as a point of national dignity, if he acted in this respect in concert with another Maritime Power, than to exact any less degree, either of excuse for the past or of security for the future, than that other Power might think necessary.

Great Britain and the United States may be satisfied jointly with smaller concessions than either Power could accept singly, if the demands of the other were likely to be higher than its own.

I therefore think it best to defer giving any precise instructions to your Excellency on this point until I shall have been informed of the views of the American Government upon it.

In the meantime, however, you will endeavour to draw from the Russian Government a proposal of their terms, as we should undoubtedly come much more conveniently to the discussion, and be much more likely to concert an agreement upon moderate terms with the American Government if a proposal is made to us, than to agree in originating one which would be satisfactory at once to both Governments and to Russia.

The other part of this question, which relates to territorial claim and boundary, is perhaps susceptible of a separate settlement; of the two principles on which the settlement could be made, viz., joint occupancy or territorial demarcation, the latter is clearly preferable.

903 I do not think I need trouble you with that. Then they suggest drawing a line at 57°. You see from that, Mr. President, that, in private communication at all events, the Russian Ministers were receding from the assertion of this exclusive maritime jurisdiction; that is very clearly shown in the next memorandum from Count Nesselrode to Count Lieven, on page 39. The first clause of the instructions to the Russian cruisers I translate thus:

That the commanders of our ships of war ought to exercise their surveillance as near as possible to the continent, that is to say, over an extent of sea which reaches a cannon shot from the coast—

In other words, the marine league—

and that they ought not to extend this surveillance beyond latitudes in which the American Company has effectively exercised its right of hunting and fishing since the epoch of its creation, ...

Clause 2. That this surveillance ought to have for its object to repress all fraudulent commerce and all attempts to injure the Company in troubling the coasts frequented by its hunters and fishers, preventing all enterprises having for their object to furnish to the aboriginal inhabitants of the country without the consent of the authorities fire-arms, munitions of war and swords.

So there you see, still further bearing out the communications between the English Ministers, the Russian instructions to their own officers, that they are to exercise their surveillance over an extent of ocean reaching only to the extent of a cannon shot from the shore; and this we know is now treated as three miles.

Now we come to a point at which this 100 mile claim absolutely disappears from the controversy. On page 45 Mr. Lyall, the Chairman of a Committee of ship-owners who were interested in this matter, writes to Mr. George Canning, on the 19th of November 1823; and he refers to a previous communication.

When you had the goodness to inform me that a representation had been made to that Government, and that you had reason to believe that the Ukase would not be acted upon; and very shortly after this communication I was informed, on what I considered undoubted authority, that the Russian Government had consented to withdraw that unfounded pretension.

Then he says:

The Committee of this Society being about to make their Annual Report to the ship-owners at large, it would be satisfactory to them to be able to state therein that official advices had been received from St. Petersburg that the Ukase had been annulled; and should that be the case, I have to express the hope of the Committee to be favored with a communication from you to that effect.

Whereupon, Mr. Canning, before he answers Mr. Lyall, communicates with Count Lieven and says: Here is a question which has been put to me. What am I to tell these shipowners?

I have received the inclosed letter from the Ship-owners Society; my answer to it must be in writing, and not long after it will be in print.

I wish, therefore, that you should know beforehand what the nature of it will be, and for that purpose I inclose a draft of it, which I will be obliged to you if
904 you will return with any remark that may occur to you, returning also Mr. Lyall's letter.

Here is Count Lieven's answer, which I translate thus:

I am infinitely obliged for your communication that you have been good enough to make me. In returning the two annexed inclosures to your letter, and in availing myself of the permission that you have had the goodness to give me, I beg the liberty of observing to you that it will be desirable that the passage marked in pencil in the minute of your response should be substituted by the announcement.

Then follow the words in inverted comas.

"That the new instructions given to the commanders of Russian cruisers are conceived with the object of preventing disturbance between the Russian vessels and those of other nations, and that in general they may be considered as having suspended provisionally the effect of the Imperial Ukase of the 4th of September 1821."

The PRESIDENT.—That is not quite right. It should be as being such as to suspend.

Sir CHARLES RUSSELL.—That is still stronger; I am much obliged to you.

Thereupon Mr. Secretary Canning by his Secretary communicates to the ship-owners in this way:

Mr. Canning cannot authorize me to state to you in distinct terms that the Ukase has been *annulled*, because the negotiation to which it gave rise is still pending, embracing, as it does, many points of great intricacy as well as importance.

But I am directed by Mr. Canning to acquaint you that orders have been sent out by the Court of St. Petersburgh to their Naval Commanders calculated to prevent any collision between Russian ships and those of other nations, and, in effect, suspending the Ukase of September 1821.

Here we have got to a definite point: the suspension of the Ukase of 1821. What had been done therefore amounted to this—a paper assertion of territorial sovereignty by the Ukase, and by the Charter under

it, communicated to two foreign Powers; a prompt refusal by those Powers to recognize the rights on the basis on which it purported to support them: and finally, a suspension of the Ukase, fully admitted by November of 1823. Did either Russia—it is no longer a question of what Great Britain did—but did either Russia or Great Britain ever retire from that position? Clearly not.

Then follows a long correspondence, a great part of which is conversant with the territorial claim, with which I need not trouble you; but there is rather an important passage on page 65 in Mr. George Canning's letter. Certain projects had passed between the parties which it would take me a great deal too long to go through. But on the 24th of July, 1824, the points in difference had been reduced to very few; and Mr. George Canning writing to Sir C. Bagot says:

The "Projet" of a Convention which is inclosed in my No. 26 having been communicated by me to Count Lieven, with a request that his Excellency would note any points in it upon which he conceived any difficulty likely to arise, or any explanation to be necessary, I have received from his Excellency the Memorandum a copy of which is herewith inclosed.

905 Your Excellency will observe that there are but two points which have struck Count Lieven as susceptible of any question. The first, the assumption of the base of the mountains instead of the summit as the line of boundary.

That, you will understand, Mr. President, relates merely to the *lisière*.

The second, the extension of the right of the navigation of the Pacific to the sea beyond Behring's Straits.

How can it be said that there was any question about the intervening sea, that is Behring Sea itself, when the question had resolved itself into the right of navigation in the sea *beyond* Behring Straits.

As to the first, no great inconvenience can arise from your Excellency (if pressed for that alteration) consenting to substitute the summit of the mountains instead of the seaward base, provided always that the stipulation as to the extreme distance from the coast to which the *lisiere* is in any case to run be adopted (which distance I have to repeat to your Excellency should be made as short as possible), and provided a stipulation be added that no forts shall be established or fortifications erected by either party on the summit or in the passes of the mountains.

As to the second point, it is perhaps, as Count Lieven remarks, new. But it is to be remarked in return, that the circumstances under which the additional security is required will be new also.

By the territorial demarcation agreed to in this Projet Russia will become possessed, in acknowledged sovereignty of both sides of Behring's Straits.

The Power which could think of making the Pacific a *mare clausum* may not unnaturally be supposed capable of a disposition to apply the same character to a strait comprehended between two shores of which it became the undisputed owner; but the shutting up of Behring's Straits, or the power to shut them up hereafter, would be a thing not to be tolerated by England.

Nor could we submit to be excluded, either positively or constructively, from a sea in which the skill and science of our seamen has been and still is employed in enterprises interesting not to this country alone, but to the whole civilized world.

The question of the Northwest Passage, if I am not wrong, was then a matter that was agitating the minds of men of enterprise.

The protection given by the Convention to the American coasts of each Power may (if it is thought necessary) be extended in terms to the coasts of the Russian Asiatic territory; but in some way or other, if not in the form now prescribed, the free navigation of Behring' Straits and of the seas beyond them must be secured to us.

These being the only questions suggested by Count Lieven, I trust I may anticipate with confidence the conclusion and signature of the Convention, nearly in conformity to the "Projet", and with little trouble to your Excellency.

It is almost needless that I should pause here. They were discussing the freedom of navigation in the Arctic Ocean beyond the Behring Sea, and about the avenue to the Arctic Ocean, the Behring Strait; and yet

it is supposed that although we have got to that point, yet the questions as to the intervening sea by which alone the Behring Straits could be approached were not already settled; namely, that there was free navigation, according to the rules of general international law.

In order to put this matter beyond the possibility of doubt, will you be good enough to turn back to page 63.

Mr. CARTER.—You do not read the letter at the bottom of the page.

906 Sir CHARLES RUSSELL.—I am going to read it in a moment. At the top of page 63 the projet which is there referred to is in these words:

It is agreed between the High Contracting Parties that their respective subjects shall enjoy the right of free navigation along the whole extent of the Pacific Ocean, comprehending the sea within Behring's Straits, and shall neither be troubled nor molested in carrying on their trade and fisheries, in all parts of the said ocean, either to the northward or southward thereof.

It being well understood that the said right of fishery shall not be exercised by the subjects of either of the two Powers, nearer than 2 marine leagues from the respective possessions of the other.

That is the only limitation there made. But the point, of course, that I am upon is the other limitation, of the enjoyment of the right of free navigation along the whole extent of the Pacific Ocean, comprehending the sea within Bering Straits.

Then says Mr. Canning the questions are limited to whether the base or the summit of the mountains is to be taken as the inside boundary of the lisière. Secondly, the extension of the right of the navigation of the Pacific to the sea beyond Behring Straits.

I now turn to page 66 to read what Mr. Carter drew my attention to, and which I was going to read. There was, a question whether or not there should be any formal renunciation, or whether a formal renunciation was necessary, or whether the treaty should be left to speak for itself; and Mr. Adams, writing from Washington, says—

A convention concluded between this Government and that of Russia for the settlement of the respective claims of the two nations to the intercourse with the northwestern coast of America reached the Department of State a few days since.

The main points determined by this instrument are, as far as I can collect from the American Secretary of State, (1) the enjoyment of a free and unrestricted intercourse by each nation with all the settlements of the other on the northwest coast of America; and (2) a stipulation that no new settlements shall be formed by Russia south, or by the United States north, of latitude 54 degrees 40 minutes.

The question of the *mare clausum*, the sovereignty over which was asserted by the Emperor of Russia in his celebrated Ukase of 1821, but virtually, if not expressly, renounced by a subsequent declaration of that sovereign, has, Mr. Adams assures me, not been touched upon in the above-mentioned Treaty.

Mr. Adams seemed to consider any formal stipulation recording that renunciation as unnecessary and supererogatory.

It had been renounced, and the Treaty was inconsistent with it; and therefore, says Mr. Adams—and quite rightly, I think—any formal or express renunciation would be simply requiring a great Power to do something which might be regarded as more or less of a humiliation, and was not at all necessary.

Now I am enabled to hurry on. Let me just remind the Tribunal of the dates. The Baron de Tuyl incident had occurred in July of 1824. The Treaty with America had been signed, and, Mr. Adams having declared that the treaty must speak for itself, had been signed without any modification. The object of the proposed modification being, as you will recollect, that north of 59 degrees 30 minutes, Russia
907 would like to have it understood that there was no right to visit the creeks, gulfs, interior seas, etc., for the ten years' period.

Baron de Tuyll had been informed by Mr. Adams, that he had "no power to construe the Treaty; it must speak for itself." Obviously some suggestion of the same kind had been made by Count Lieven to Mr. George Canning, to see whether in the English treaty, which was not then at the same stage of completion, some modification of the same sort could not be introduced: and when the American treaty comes to hand, Mr. George Canning reads it, and thereupon, on the 25th of October, meets and meets successfully Count Lieven's point. On the 28th October, 1824, page 72, he says:

MY DEAR COUNT LIEVEN: I cannot refrain from sending to your Excellency the inclosed extract from an American newspaper, by which you will see that I did not exaggerate what I stated to you, as the American construction of the Convention signed at St. Petersburgh.

Count Lieven had obviously been trying to effect the same thing with England that Baron de Tuyll had tried to effect with the United States.

It is to this construction that I referred, when I claimed for England (as justly quoted by Count Nesselrode) whatever was granted to other nations.
No limitation here of 59 degrees.
Believe me, etc. GEORGE CANNING.

Yet, says my learned friend, Mr. Carter, we inherited this secret meaning which was put by Russia upon the 1824 Treaty with America: I do not think he said, but rather suggested, that it was accepted by the United States. After that, he says, comes the treaty with Great Britain; and therefore, as you find the one clause borrowed from the other, you must give it the same meaning in each. Therefore you are to put upon the second the meaning which Baron de Tuyll suggested, even if no modification were made, might be put upon the first, although that secret meaning, or a suggestion of it, was never conveyed to Great Britain.

Mr. Justice HARLAN.—What does he mean there by "No limitation here of 59 degrees?"

Sir CHARLES RUSSELL.—Do you not see, Judge, that Baron de Tuyll's memorandum was directed to getting an admission that the right to visit the interior seas, creeks, harbors, etc., did not apply to Russian possessions north of 59 degrees?

Mr. Justice HARLAN.—Yes; but his memorandum was after that letter. The Baron de Tuyll memorandum in Mr. Adams' diary, was after the date of the Canning letter.

Sir CHARLES RUSSELL.—No; on the contrary, I have just been stating the opposite.

Mr. Justice HARLAN.—The quotation from Mr. Adams' diary is under date of December 28, 1884, and this letter you are reading from is dated October 25, 1824.

908 Sir CHARLES RUSSELL.—I think, Sir, there must be some mistake.

Mr. Justice HARLAN.—That was the reason I asked you.

Sir CHARLES RUSSELL.—It was quite a proper reason, Sir. I think that date should have been July 24th, instead of December 24th, because by December 24th the Treaty had already been signed and ratified. It was all past and gone. It was in April of 1824, and therefore that must be a mistake in date.

Sir RICHARD WEBSTER.—I think it is a mistake in Mr. Blaine's letter. I will trace it out.

Sir CHARLES RUSSELL.—I think, Sir, it is clear that the date of December 24th, as the date on which the conversation took place, must be inaccurate, for the reason I have given; because the American

Treaty was signed and ratified, I think, in April of 1824—the 17th of April, 1824.

Mr. CARTER.—It was signed, but where is the evidence that it was ratified?

Sir CHARLES RUSSELL.—We will follow it up, if it be material. It does not seem to me to be of much importance, one way or the other.

Mr. Justice HARLAN.—I only asked because you seemed to be expounding this letter of October 25th 1824. I gather from the minute in Mr. Adams' diary that when his conversation occurred with Baron de Tuyll, the Treaty had not then been ratified.

Sir CHARLES RUSSELL.—Certainly Judge; so do I, also. But let me explain what the position of things is. We will get the dates right, and put them before you at our next meeting. But we can discuss the point wholly apart from dates.

Mr. Justice HARLAN.—Yes.

Sir CHARLES RUSSELL.—What appears is this: After the Treaty had been agreed upon and signed, but before its ratification, Baron de Tuyll sought to have it modified in the sense set out in Mr. Adams' diary. Mr. Adams' answer was: "The Treaty is the Treaty; that must speak for itself." At the same time, or at a later period, it may be, they were endeavouring to get the same limitation into the English treaty. What was that limitation? It was this:

> It is not the intention of Russia to impede the free navigation of the Pacific Ocean. She would be satisfied with causing to be recognized, as well understood and placed beyond all manner of doubt, the principle that beyond 59 degrees 30 minutes no foreign vessel can approach her coasts and her islands, nor fish nor hunt within the distance of two marine leagues.

That is to say, beyond 59 degrees 30 minutes.

Accordingly, when Count Lieven and Mr. George Canning are discussing the matter, Count Lieven seeks to have introduced into the English Treaty, a limitation of that right of approaching creeks and interior seas, to 59 degrees 30 minutes. I hope you follow me, Judge.

Mr. Justice HARLAN.—I do.

Sir CHARLES RUSSELL.—In other words, the ten-year clause
909 is limited to 50° 30′, and not further north, and accordingly, if you will turn to page 69 of the 2nd Volume of the Appendix to the British Case, you will see that in their Contre-Projet, article III, it is proposed:

> That as to the possessions of the two Powers, designated in the preceding articles, namely, to 59° 30′ minutes of north latitude, but not farther, the respective vessels and those of their subjects shall, for ten years, from the 5 (17) April, 1824, have the reciprocal right of frequenting freely the gulfs, harbours, creeks, etc.

Mr. Canning then gets the newspaper description of the American Treaty. Thereupon he writes to Count Lieven, in effect: "You have been pressing me to agree to a limitation of the right to frequent interior creeks, seas, etc., to the point of 59° 30′, and no farther north, and you have been urging that upon me because you say that is the American Treaty. I now send you enclosed an account of the American Treaty",—and he winds up his letter:

> No limitations here of 59°.

On pages 71 and 72 is the passage which is enclosed:

Extracts from the National Intelligencer, of August 3, 1824.

> CONVENTION WITH RUSSIA.—Mr. Lucius Bull, who arrived in this city a few days ago, was the bearer of despatches from our Minister at St. Petersburgh. By these it appears that a Convention was concluded on the 5th (17th) April last between

Mr. Middleton, on the part of the United States, and Count Nesselrode and Mr. Poletica on the part of Russia. We understand that the Convention consists of six Articles, in which all the points in dispute between the two Governments are adjusted in a manner the most honourable and advantageous to this country.

The 1st Article authorizes the free navigation of the Pacific Ocean by both Parties, and recognizes the right of fishing and of landing on all points of the west coast not already occupied, in order to trade with the aborigines.

2nd Article provides that the citizens or subjects of neither country shall land at points occupied by either, without the permission of the Governor or Commandant.

3rd Article fixes the boundary-line at 54 degrees, north of which the United States are not to form Establishments, and south of which Russia cannot advance.

4th Article allows free entrance to both Parties for ten years into all the gulfs, harbours, etc., of each for the purposes of fishing and trading with the natives.

5th Article interdicts a trade in fire-arms and liquors, and provides that violations of this Article shall be punished not by seizure of the vessel, but by penalties to be prescribed by each Government on its own citizens or subjects.

6. This Article prescribes that the ratification shall be exchanged within ten months from the date of the Treaty.

This Convention may be regarded as a second signal effect of the manly and independent Message of our President to the late Congress. If the Emperor Alexander had left it to our own Government to fix the terms of the Treaty, it could not more completely have secured all our interests in the Pacific. We congratulate the country upon this new evidence of the excellence of the system which has been pursued by our present Administration.

Now, in the face of that, can anything in this world be clearer why it is that Mr. Canning says, "you have been pressing me about this American Treaty. Here is the American Treaty. No such limitation north of 59 degrees at all."

Now, sir, I think I have explained the point you referred to.

910 Mr. Justice HARLAN.—Will you point me again to the document which shows that Count Lieven was pressing that important view about 59 degrees?

Sir CHARLES RUSSELL.—That appears only from the Projet to which I have already referred. It is called Counter Draft of the Russian Plenipotentiaries. It is on page 69.

Mr. Justice HARLAN.—Which of the articles is that?

Sir CHARLES RUSSELL.—Article III—beginning with the first paragraph of Article III.

My friend says in reference to the suggestion, that I made—a suggestion which I thought was probable, namely, that he had been putting forward the American Treaty, that there is no evidence in the correspondence that he was using the American Treaty as an argument in that direction. That does not appear in the correspondence, but he was pressing forward that projet; and the answer is the answer I have given. He says triumphantly to Count Lieven, "No limitation here of 59 degrees", and in effect he says "We are not going to be satisfied with less than the United States people have secured under their Treaty." That is the purport and character of the negotiation, and on that basis the negotiation proceeds.

I am afraid I shall have to go through the Treaty at some length, and I would prefer to do that to-morrow.

The Tribunal accordingly adjourned until Wednesday, May 17, 1893, at 11.30 o'clock A. M.

TWENTY-FOURTH DAY, MAY 17TH, 1893.

Sir CHARLES RUSSELL.—Mr. President and Gentlemen, yesterday I stated that the Baron de Tuyll incident as recorded in Mr. Quincy Adams' diary, under the date of December 24, was, as we conceived, inaccurately stated as having taken place in December. We thought we had discovered extrinsic reasons showing that it was at an earlier date; but I find, on further examination with my learned friends, that I was not well founded in that, and that the date is correctly recorded in the diary as being in December, 1824. I want to explain in a sentence how that whole matter arose.

The PRESIDENT.—Have you ascertained if it was before the ratification?

Sir CHARLES RUSSELL.—Yes.

The PRESIDENT.—What is the date of the ratification?

Sir CHARLES RUSSELL.—It was subsequent. The actual ratification was, I think, in January, 1825. I have not got it accurately in my mind at the moment; but my learned friend suggests that date to me.

Sir RICHARD WEBSTER.—It will be found at page 277 of Volume I of Appendix to the United States Case.

Mr. Justice HARLAN.—The Treaty in English and French is found at page 76 of your volume.

Sir CHARLES RUSSELL.—Yes.

The PRESIDENT.—It is dated the 11th of January, 1825.

Sir CHARLES RUSSELL.—Now I was about to explain, as I can do in a sentence, without troubling the Members of the Tribunal to refer to any document, the origin of the representation of Baron de Tuyll and also the attempt at limitation which is mentioned in the *contre-projet*, and which is referred to in the correspondence of August, 1824. This is the explanation. I have told the Tribunal that this Commercial Company was a very important and influential Company. It was the Company which, as the diplomatic correspondence has shewn, had been largely instrumental in obtaining the Ukase of 1821. Persons in high positions and of commanding influence apparently were concerned in it, and after the Treaty with the United States had been agreed to and signed, but before the exchange of ratifications, there had been a meeting which was called a Council of Dignitaries; and that was held in July, 1824. That Conference of Dignitaries was undoubtedly held at the instance of this same Company; and, in view of the construction which that Company was putting upon the Treaty concluded with the United States, and as the outcome of that Conference of Dignitaries, two things took place at a later date.

The Baron de Tuyll incident.

912

The conference was in July. In August 1824 we have in the communications with Mr. Canning the attempted limitations in the *contre-projet* that I referred to yesterday, and later we have the representations in December of the same year of Baron de Tuyll at Washington. Now as regards that Council of Dignitaries, my learned friend, Mr. Carter,

did not, and I should have been surprised if he had, lay any stress upon it so far as the document itself is concerned, for the position of things is this: it is a record of a private meeting of a number of distinguished persons. It records certain views and opinions as to the Treaty, which views are expressed to have been not the unanimous views of the members of the conference, but a majority of the conference. The document was never communicated to the United States. It was never communicated to Great Britain. It lay buried and forgotten, until when examining the records with a view to this controversy it was disentombed. But as far as either the United States, or Great Britain is concerned, neither the documents, nor the results of that conference, were communicated to either one or other of the Powers; and it is entirely out of place, therefore, in the consideration of what the construction of the United States Treaty in fact is. I have dealt with that, and will not recur to it. Mr. Adams took the position which was the only position he could take. We have entered into a definite Treaty: the construction of that Treaty is not for me. We stand by it, whatever its purport and effect are. As regards the English negotiations, I do not require to recur to them again to mention the suggested limitation, but if there is anything in the mind of the Court which I could help to explain, I should be glad to, because I desire that my argument should at least be clearly apprehended by every member of the Tribunal.

Mr. Justice HARLAN.—The President was asking me when the Senate ratified the Treaty. I do not know the exact date, but it was between December 6th, 1824, and the 11th January, 1825.

The PRESIDENT.—I asked because it would seem that he might still have been at liberty to alter it, as it was not ratified by the Senate. I mean it might have been altered if he had not insisted on his interpretation of it.

Sir CHARLES RUSSELL.—I should like to say this, especially in reference to an observation that Mr. Senator Morgan has made more than once in this matter, that no executive minister of the United States, even in the name of the Executive, could alter the Treaty. There is no power to do that.

The PRESIDENT.—But it had not passed the Senate, and he was not bound. He was free to go on negotiating.

Sir CHARLES RUSSELL.—Yes, but before it reached the point to which it had then attained there must have been some means, I
913 should apprehend, of obtaining the views of the Senate upon it, because the Treaty was agreed to by the United States, and all that was required was the formal ratification and exchange of formal documents, and ratification implies the assent of the Senate. It is not to be supposed that the United States Government, not having the power to make a treaty which would be binding, would proceed to those lengths without having first ascertained what the views of the Senate would be.

Mr. Justice HARLAN.—The Senate does not know anything about a Treaty under our system, until it is concluded by the Executive Department and submitted to that body.

Sir CHARLES RUSSELL.—That is very likely correct, but I do not suggest anything inconsistent with that.

Lord HANNEN.—My impression is that the ratification is something different from the assent. It would be treated as a formality.

Sir CHARLES RUSSELL.—So I understand.

Mr. Justice HARLAN.—That is true.

Sir CHARLES RUSSELL.—But I did not understand what was the position of the Senate in December; and though I cannot think it important, I confess, I do not know where Mr. Justice Harlan finds that the adoption by the Senate was after December?

Mr. Justice HARLAN.—Because the date in Mr. Adams' diary is December 6th, 1824, and the proclamation of the President is the 11th January 1825.

Sir CHARLES RUSSELL.—Quite so; that is a mere formal business. The point is, when was the assent of the Senate given?

The PRESIDENT.—He says on the 6th December—"I added the Convention would be submitted immediately to the Senate." That is in the diary which you read yesterday, and that shows that the Executive was at liberty to continue negotiations, but in reality they insisted on their view.

Sir CHARLES RUSSELL.—Yes, that would appear to be so. Then it stands thus: Neither party being bound, there was the opportunity, if the Senate desired, to fall in with the views of negotiating the Treaty upon different lines and submitting it upon different lines to the Senate for its approval. But Mr. Adams says:—No, the Treaty is the Treaty as it stands, and as it stands it has to be submitted to the Senate. It does not matter, as far as the strength of the argument is concerned, what is the state of things as regards the United States and as regards Great Britain. The suggestion emanating, as far as we can judge, from that Conference of Dignitaries, appears in the 3rd article of the *contre-projet* that I referred to yesterday. It is an attempt to limit the right of visitation in the gulfs, harbours and creeks. That is enclosed and sent by Sir Charles Bagot to Mr. Canning in the letter which immediately precedes it of the 12th August 1824.

Now how was that suggestion met? I pass to page 72 of that same volume and there you will find a letter from Mr. George Canning,
914 Foreign Minister in London, to Mr. Stratford Canning, who was then at St. Petersburg, of the 8th December 1824.

Meanwhile, in the month of October previously, information had reached Mr. Canning through the public channels of information what the terms of the Treaty as between the United States and Russia were, and accordingly Mr. George Canning in October writes the short letter, that you now understand and appreciate, to Count Lieven, the important words of which are, after calling attention to the terms of the American Treaty:

> No limitation here of 59°.

He says the proposed limitation is out of the question. There is nothing of the sort in the American Treaty, and he will not have it in the English Treaty.

That is the purport of it. Now comes the formal detailed answer from Mr. George Canning in London in reference to the *contre-projet*.

He says:

> I inclose to you a copy (1) of the *projet* which Sir Charles Bagot was authorized to conclude and sign some months ago, and which we had every reason to expect would have been entirely satisfactory to the Russian Government.
>
> (2) Of a *contre-projet* drawn up by the Russian Plenipotentiaries, and presented to Sir Charles Bagot at their last meeting before Sir Charles Bagot's departure from St. Petersburgh.
>
> (3) Of a despatch from Count Nesselrode, accompanying the transmission of the *contre-projet* to Count Lieven.

Then he goes on:

> In that despatch, and in certain marginal annotations upon the copy of the *projet*, are assigned the reasons of the alterations proposed by the Russian Plenipotentiaries.

In considering the expediency of admitting or rejecting the proposed alterations, it will be convenient to follow the Articles of the Treaty in the order in which they stand in the English *projet*.

You will observe, in the first place, that it is proposed by the Russian Plenipotentiaries entirely to change that order, and to transfer to the latter part of the instrument the Article which has hitherto stood first in the *projet*.

To that transposition we cannot agree, for the very reason which Count Nesselrode alleges in favor of it, namely, that the "économie" or arrangement of the Treaty ought to have reference to the history of the negotiation.

The whole negotiation grows out of the Ukase of 1821.

So entirely and absolutely true is this proposition, that the settlement of the limits of the respective possessions of Great Britain and Russia on the north-west coast of America was proposed by us only as a mode of facilitating the adjustment of the difference arising from the Ukase by enabling the Court of Russia, under cover of the more comprehensive arrangement, to withdraw, with less appearance of concession, the offensive pretensions of that Edict.

It is comparatively indifferent to us whether we hasten or postpone all questions respecting the limits of territorial possession on the Continent of America, but the pretensions of the Russian Ukase of 1821 to exclusive dominion over the Pacific could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it.

You will therefore take care, in the first instance, to repress any attempt to give this change to the character of the negotiation, and will declare without reserve that the point to which alone the solicitude of the British Government and the
915 jealousy of the British nation attach any great importance is the doing away (in a manner as little disagreeable to Russia as possible) of the effect of the Ukase of 1821.

That this Ukase is not acted upon, and that instructions have been long ago sent by the Russian Government to their cruizers in the Pacific to suspend the execution of its provisions, is true; but a private disavowal of a published claim is no security against the revival of that claim.

And so forth.

The Tribunal will forgive me if I ask permission to read one or two more passages, because I feel I ought to apologize for labouring this point, which we submit is absolutely clear; but, as the Tribunal have not thought fit to make any intimation, nor my learned friends either, of course I can leave no ground untouched which demonstrates beyond question the position we assume. The concluding sentences are as follows:

The right of the subjects of His Majesty to navigate freely in the Pacific cannot be held as matter of indulgence from any Power. Having once been publicly questioned, it must be publicly acknowledged.

We do not desire that any distinct reference should be made to the Ukase of 1821; but we do feel it necessary that the statement of our right should be clear and positive, and that it should stand forth in the convention in the place which properly belongs to it "—that is, the first Article,—" as a plain and substantive stipulation, and not be brought in as an incidental consequence of other arrangements to which we attach comparatively little importance.

Now, I beg attention to the remainder of this.

This stipulation stands in the front of the Convention concluded between Russia and the United States of America; and we see no reason why upon similar claims we should obtain exactly the like satisfaction.

The word "not" is left out there. The sentence which follows is particularly significant.

For reasons of the same nature, we cannot consent that the liberty of navigation through Behring Straits should be stated in the Treaty as a boon from Russia.

Of course, if there was to be navigation through Behring Straits, there must be navigation through Behring Sea, which leads to Behring Straits.

The tendency of such a statement would be to give countenance to those claims of exclusive jurisdiction against which we, on our own behalf, and on that of the whole civilized world, protest.

No specification of this sort is found in the Convention with the United States of America, and yet it cannot be doubted that the Americans consider themselves as secured in the right of navigating Behring Straits and the sea beyond them.

Mr. Justice HARLAN.—May I ask you, Sir Charles, whether you contend that the Ukase of 1821 was intended to close the open waters of Behring Sea, outside of the 100 miles, to navigation?

Sir CHARLES RUSSELL.—I certainly most distinctly say that that was its effect, whatever the intention was: it was the assertion of a right to do it.

The language of M. de Poletica is distinct. He says:

We have a right to treat it as a shut sea; it fulfils all the conditions of a shut sea;

916 He was asserting that there was only an intention to exercise territorial jurisdiction 100 miles from the land, apparently ignorant of the fact that the assertion of 100 miles from the land would make Behring Sea a closed sea. There can be no question about it, I think. It was so treated by the King's Advocate: it was so treated by Lord Stowell, whose authority of course is great. Both these lawyers treated it as an assertion of territorial dominion practically closing Behring Sea, and assuming dominion over Behring Sea. In fact, M. Poletica's explanation is clear. He says:—That is the extent of our right, but we do not intend to exercise it beyond 100 miles from the shore.

The PRESIDENT.—The language of M. de Poletica, and of the Minister of Foreign Affairs, Count Nesselrode, which you read yesterday, is very significant upon the point—that Russia asserted a right which they did not intend perhaps, to exercise, or press; but they asserted it, and were very eager in these Treaties not to bring into the discussion any question of principle.

Sir CHARLES RUSSELL.—There is no other part of that letter which I think is important. There is however one letter I should like to call attention to in the United States correspondence relative to the English Treaty. It is on page 152 of Volume 1 of the Appendix to the United States Case. Mr. Middleton is writing from St. Petersburgh, and he is giving his views of the Treaty, which he knows has just then been concluded between Great Britain and Russia. He says:

I have the honor to acquaint you that a convention was signed yesterday by the Russian and British Plenipotentiaries relative to navigation, fisheries, and commerce in the Great Ocean, and to territorial demarcation upon the northwest coast of America. In a conversation held this day with Mr. Stratford Canning, I have learned this Treaty is modelled in a degree upon that which was signed by me in the month of April last, and that its provisions are as follows, to wit:

The freedom of navigation and fishery throughout the great Ocean, and upon all its coasts; the privilege of landing at all unoccupied points; that of trading with the natives; and the special privileges of reciprocal trade and navigation secured for 10 years upon the northwest coast of America, together with the mutual restrictions prohibiting the trading in fire arms.

And so on. There is the view which Mr. Middleton expresses of the British Treaty.

Now let me emphasize this matter before I come to the Treaty itself, which, if it were not for the introduction of an enormous mass of collateral, and to a large extent irrelevant topics, I should, in the ordinary course, have gone to straight. But let me, before I come to the Treaty, briefly emphasize one or two points. It is, clear, first, that the United States, by the mouth of Mr. Adams, traversed the whole claim set up by Russia:—We can admit no part of this claim. That claim was an assertion of territorial right from the Behring Strait, along the coast south to 55 degrees of north latitude.

The attitude of Great Britain on the other hand, is equally emphatic, I might almost say more emphatic, because they say again and
917 again,—There are two questions here involved—the question of territorial dominion on the mainland, and the assertion of territorial dominion on the sea: We regard the latter as the more important.

And what can be more emphatic than that note of the Duke of Wellington which I read yesterday, in which he says, in reference to the paper handed to him as an intended basis for negotiation: We cannot condescend to enter into negotiation upon the basis of a paper which claims this absurd pretension of jurisdiction 100 miles from the coast.

You recollect the memorandum I read yesterday.

We will not enter into a negotiation until that is removed from the area of discussion.

Thereupon we have the intimation given that the orders to cruisers will be confined to the coast; that nothing will be done that will call for objection; that the orders given by Russia to its cruisers will limit the effect of the Ukase to the distance from the shore recognized by general international law; and upon that basis the question proceeds.

Now I come to the Treaty itself, making my final comment, if I may be permitted to do so, in the shape of a question. Supposing Russia had said: We intend to confine this treaty to the south of the Aleutians as far as freedom of navigation is concerned, but we do not intend to budge one inch from our assertions of claim of dominion and jurisdiction in Behring Sea—What would have been the result? Is there any member of the Tribunal who has any doubt that there would have been an end of the negotiations altogether, and the question never could have been settled at all on the lines of the Treaty, because the Duke of Wellington says: I will not treat a paper as the basis of the negotiations in which that pretention is put forward.

Now I come to the Treaty, which, as I said, in an ordinary case I should have come to hours ago. I refer for convenience to the print of that Treaty in the first volume of the United States Appendix, page 39. It begins by reciting that the Powers are desirous—

Consideration of Treaty of 1825.

By means of an agreement which may settle upon the basis of reciprocal convenience the different points connected with the commerce navigation and fisheries of their subjects in the Pacific Ocean:

Without any limitation.

As well as the limits of their respective possessions on the northwest coast of America.

Again without any limitation.

I answer the suggestion that that went up to Yakutat Bay, at 59° 30′, by saying that there is no contemporaneous document in which any such limitation of the northwest coast is mentioned, while there are a great number—I have already read many of them, beginning with the Ukase itself—in which the northwest coast is described as beginning from Behring Straits and going down, according to the Russian claim, to 55° of north latitude.

918 Then it proceeds in Article I, in these words:

It is agreed that the respective subjects of the High Contracting Parties shall not be troubled or molested in any part of the ocean, commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in landing at such parts of the coast as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in the following Articles.

Is there any one Member of the Tribunal in whose mind there is the slightest doubt that in this Treaty (which was a Treaty to cover the whole area of the dispute, in order to settle once and for ever the pretensions of the Ukase of 1821 with its assertion of jurisdiction) it was intended by the use of the words "in any part of the Ocean commonly called the Pacific Ocean", to include Behring Sea? Is there the slightest doubt that it was not intended to exclude from that term "Pacific Ocean" a vast extent of sea measuring from north to south something like 1,400 miles and from east to west in its widest part something like 1,000 miles?

Now I go on to Article II, which says:

In order to prevent the right of navigating and fishing exercised upon the ocean by the Contracting Parties, from becoming the pretext for an illicit commerce, it is agreed that the subjects of His Britannic Majesty shall not land at any place where there may be a Russian establishment without the permission of the Governor or Commandant: and, on the other hand, that Russian subjects shall not land without permission at any British establishment on the north-west coast.

Then Article III, says:

The line of demarcation between the possessions of the High Contracting Parties upon the coast of the continent and the islands of America to the north-west, shall be drawn in the manner following.

I need not trouble the Tribunal to follow that line of demarcation, but the concluding words of the description are not unimportant. After describing the course of the line nearly up to the Arctic Ocean, the Article concludes with these words:

Shall form the limit between the Russian and British possessions on the continent of America to the north-west.

What does that mean except the north-west coast of America?

Then there is a stipulation as to the mode in which the inland boundary is to be drawn, namely, that it is not to exceed 10 marine leagues from the ocean, following the line of mountains where they do not exceed 10 marine leagues. Then it proceeds in Article V to say:

It is moreover agreed that no establishment shall be formed by either of the two parties within the limits assigned by the two preceding Articles to the possessions of the other; consequently British subjects shall not form any establishment

I call attention to this language——

either upon the coast or upon the border of the continent

that is the *lisière*——

919 comprised within the limits of the Russian possessions as designated in the two preceding Articles, and, in like manner no establishment shall be formed by Russian subjects beyond the said limits.

Then Article VI says:

It is understood that the subjects of His Britannic Majesty, from whatever quarter they may arrive, whether from the ocean or from the interior of the continent, shall for ever enjoy the right of navigating freely and without any hindrance whatever, all the rivers and streams which in their course towards the Pacific Ocean may cross the line of demarcation upon the line of coast described in Article III of the present Convention.

That clearly applies to the *lisière;* and it is a provision that, the crest of the mountains when they do not exceed 10 marine leagues from the coast being the dividing line, there is to be a right of navigation of rivers which would be the means of reaching the British possessions behind that 10-league strip, and therefore the stipulation is that for ever there shall be the right to navigate these rivers freely and without hindrance.

Now I go to Article VII. Article VI grants a perpetual right. Article VII is limited to a definite period. It says:

It is also understood that, for the space of ten years from the signature of the present Convention, the vessels of the two Powers, or those belonging to their respective subjects shall mutually be at liberty to frequent, without any hindrance whatever, all the inland seas, the gulfs, havens and creeks on the coasts mentioned in Article III, for the purposes of fishing and of trading with the natives.

Therefore under that Article there is for a limited period of time a right given (even as to waters which would be according to law territorial waters) of user of such waters, and that extends along the whole of the coast mentioned in Article III. Really I feel that I should be wrong in dwelling too long on this matter; but there are one or two other things to which I must call attention.

The Tribunal will ask the question:—What position after this Treaty, and before the concession to the United States, did Russia in fact assume? Because of course the conduct of Russia will throw light upon its view of its obligations and its rights so far as they were based on that Treaty, or so far as they are affected by that Treaty, or so far as they existed according to general law. For that purpose I will refer the Tribunal to the British Case, and I would begin, (although I do not intend to read it all) at page 77, which gives a history of the various records, so far as we have got them, of tradings, which, up to 1824–1825 unquestionably were almost entirely south of the Aleutian peninsula. But I pass on, and I ask the Tribunal to follow the position taken up by the United States in the first instance in 1840 in the case of the "Loriot". This vessel undoubtedly was seized or interfered with in a position south of the Aleutians, and somewhere in the neighbourhood of Sitka. But we have

Position assumed by United States in the case of "Loriot".

920 got the views taken, at that time, by Mr. Forsyth (who was then the Secretary of State), of the effect of the Treaty of 1824. At page 80 an excerpt is given from a letter to Mr. Dallas. It is in these words:

On the other hand, should there prove to be no Russian Establishments at the places mentioned, this outrage of the "Loriot" assumes a still graver aspect. It is a violation of the right of the citizens of the United States, immemorially exercised, and secured to them as well by the law of nations as by the stipulations of the 1st article of the convention of 1824, to fish in those seas and to resort to the coast, for the prosecution of their lawful commerce upon points not already occupied. As such it is the President's wish, that you should remonstrate in an earnest and respectful tone against this groundless assumption of the Russian Fur Company, and claim from His Imperial Majesty's Government for the owners of the brig "Loriot", for their losses and for the damages they have sustained, such indemnification as may, on an investigation of the case, be found to be justly due to them.

Mr. Dallas himself, wrote on the 16th August in these terms:

The 1st article asserts for both countries general and permanent rights of navigation, fishing, and trading with the natives, upon points not occupied by either north or south of the agreed parallel of latitude——

without any limitation at all.

Then Mr. Forsyth writes to Mr. Dallas on the 3rd November, referring to the same Article. He says:

The 1st Article of that instrument is only declaratory of a right which the parties to it possessed under the law of nations, without conventional stipulations, to wit, to navigate and fish in the Ocean upon an unoccupied coast, and to resort to such coast for the purpose of trading with the natives.

. . . . . .

The United States, in agreeing not to form new establishments to the north of latitude of 54° 40′ N., made no acknowledgment of the right of Russia to the territory above that line.

So far as the United States is concerned probably that may be correct; I do not stop to criticise that. Then he goes on:

It cannot follow that the United States ever intended to abandon the just right acknowledged by the 1st Article to belong to them under the law of nations—to frequent any part of the unoccupied coast of North America for the purpose of fishing or trading with the natives. All that the Convention admits is an inference of the right of Russia to acquire possession by settlement north of 54° 40′ N. Until that actual possession is taken, the 1st Article of the Convention acknowledges the right of the United States to fish and trade as prior to its negotiation.

Then in his despatch of the 23rd February, 1838, Count Nesselrode says:

It is true, indeed, the first Article of the Convention of 1824, to which the proprietors of the "Loriot" appeal, secures to the citizens of the United States entire liberty of navigation, in the Pacific Ocean, as well as the right of landing without disturbance upon all points on the northwest coast of America not already occupied, and to trade with the natives.

Again, Mr. Dallas wrote to Count Nesselrode on the 5th (17th) March 1838, and in that he interprets the Convention as applying to any part of the Pacific Ocean. He says:

The right of the Citizens of the United States to navigate the Pacific Ocean,
921 and their right to trade with the aboriginal natives of the north-west coast of America, without the jurisdiction of other nations, are rights which constituted a part of their independence as soon as they declared it. They are rights founded in the law of nations enjoyed in common with all other independent sovereignties, and incapable of being abridged or extinguished except with their own consent.

Then he proceeds to argue the question; but I do not think I need trouble the Tribunal to read the whole of that, although I do not mean to suggest it is not important; but it looks like piling up a mass of argument upon a point which we have to submit is exceedingly clear.

Somewhere between 1835 and 1845 the whaling industry seems to have become very important. Whalers undoubtedly had penetrated to Behring Sea, and accordingly you will find at the bottom of page 83 this statement:

At this time—

that is in 1840:

whalers were just beginning to resort to Behring Sea; from 1840 to 1842 a large part of the fleet was engaged in whaling on the "Kadiak Grounds". Writing in 1842, Etholen says, that for some time he had been constantly receiving reports from various parts of the Colony of the appearance of American whalers in the neighborhood of the shores.

In the same year Etholen relieved Kuprianof as Governor at Sitka.

In 1841 the Charter of the Russian American Company was renewed for a further term of twenty years. Etholen reported the presence of fifty foreign whalers in Behring Sea.

I hope the importance of this is appreciated—whaling is one of the things expressly mentioned in the Ukase. There is no restriction in the Treaty to any kind of fishing; it is general and without qualification. Then at the bottom of page 83 you will find this:

In 1842, according to Etholen, thirty foreign whalers were in Behring Sea. He asks the Russian Government to send cruisers to preserve this sea as a *mare clausum*.

His efforts were, however, unsuccessful, the Minister for Foreign Affairs replying that the Treaty between Russia and the United States gave to American citizens the right to engage in fishing over the whole extent of the Pacific Ocean.

The reference to that is given.

Mr. Justice HARLAN.—Who is Etholen?

Sir CHARLES RUSSELL.—He was at that time Governor of Alaska.

Then it proceeds:

In the same year, inland explorations by Zagoskin, which continued till 1844, began. Sir George Simpson, Governor of the Hudson's Bay Company, reached the Stikine post just in time to prevent an Indian uprising. He also visited the Russian establishment at Sitka, and completed an arrangement between the Companies to interdict trade in spirits on the coast.

Lord HANNEN.—You were about, Sir Charles, to tell us where that statement is. I am referring to the bottom of page 83.

Sir CHARLES RUSSELL.—It is in Bancroft's History of Alaska, page 583.

922 Lord HANNEN.—I mean the sentence with reference to the Minister for Foreign Affairs.

Sir CHARLES RUSSELL.—That will be found in the citations lower down.

Lord HANNEN.—That is what I want to get.

Sir CHARLES RUSSELL.—It is in Bancroft, who is an American author, as probably you are aware. Then it goes on to say:

About this time the Russian American Company became alarmed at the danger to their fur trade. Every effort was, therefore, put forward by the Company and the Governors to induce the Foreign Office of the Russian Government to drive off these whalers from the coasts, and by excluding them for a great distance from shore prevent trespasses on shore and the traffic in furs.

At this time pelagic sealing, although it is admitted to have been carried on from time immemorial—I mean from the coasts, by the natives—probably, had not assumed very large proportions; and apparently the American subjects and the British subjects, and others, were doing what, at another period, the Americans had done in the Falkland Islands, namely, making descents on the islands themselves, and taking seals in that way, which they had no right from any point of view to do; and accordingly the suggestion is here made, that in order to prevent raids the Russian Government should authorize the driving of these whalers off the coasts.

Then it proceeds to say:

In 1843 explorations were carried out by the Russian on the Sustchina and Copper Rivers.

The whalers from 1843 to 1850 landed on the Aleutian and Kurile Islands committing depredations. United States captains openly carried on a traffic in furs with the natives. Tikhmenieff writes,

From 1843 to 1850 there were constant complaints by the Company of the increasing boldness of the whalers.

This is an extract from a historical review of the formation of the Russian American Company and their proceedings, written by Tikhmenief, a Russian chronicler. It is referred to on page 40 of volume 1 of the Appendix to the British Case.

I am also reminded in this connection that the United States Counter Case, on page 24, refers to this enumeration of historical facts by us, and says:

Later, however, especially in the years following 1840, Behring Sea was actually visited, as pointed out at pages 83 to 90 of the British Case, by numerous vessels, mostly whalers.

Of course, the point of this is to see what, if anything, Russia did. That is the point which I am now coming to. I now read from page 84 of the British Case.

In 1846 the Governor General of Eastern Siberia asked that foreign whalers should not be allowed to come within 40 Italian miles of the Russian shores.

Tikhmenieff thus describes the result of these representations:

The exact words of the letter from the Foreign office are as follows:

923 The fixing of a line at sea within which foreign vessels should be prohibited from whaling off our shores would not be in accordance with the spirit of the Convention of 1824, and would be contrary to the provisions of our Convention of 1825 with Great Britain. Moreover, the adoption of such a measure, without preliminary negotiation and arrangements with the other Powers, might lead to protests, since no clear and uniform agreement has yet been arrived at among nations in regard to the limit of jurisdiction at sea.

In 1847 a representation from Governor Tebenkof in regard to new aggressions on the part of the whalers gave rise to further correspondence. Sometime before, in June 1846, the Governor General of Eastern Siberia had expressed his opinion that, in order to limit the whaling operations of foreigners, it would be fair to forbid them to come within 40 Italian miles of our shores, the ports of Petropaulovsk and Okhotsk to be excluded, and a payment of 100 silver roubles to be demanded at those ports from every vessel for the right of whaling. He recommended that a ship of war should be employed as a cruiser to watch foreign vessels.

Now there is a distinct claim addressed to the Government for protection. This is the answer:

The Foreign Office expressly stated as follows in reply:

This is again a textual quotation.

We have no right to exclude foreign ships from that part of the Great Ocean which separates the eastern shore of Siberia from the northwestern shore of America, or to make the payment of a sum of money a condition to allowing them to take whales.

What was that sea which is part of the Great Ocean unless it was the Behring Sea—that part of the Great Ocean which separates the eastern shore of Siberia from the north-western shore of America? May I call the attention of the Tribunal to the map? What is the sea that separates Siberia, on the one hand, from the north-west coast of America on the other, unless it is the Behring Sea; and what is the Great Ocean of which that intervening sea is described as part unless it is the Great South Sea, or the Pacific Ocean? The language is indubitable and unmistakeable.

Tikhmenieff continues,

The Foreign Office were of opinion that the fixing of the line referred to above would re-open the discussions formerly carried on between England and France on the subject. The limit of a cannon-shot, that is, about three Italian miles, would alone give rise to no dispute. The Foreign Office observed in conclusion, that no Power had yet succeeded in limiting the freedom of fishing in open seas,

that is literally, historically true;

and that such pretensions had never been recognized by the other Powers. They were confident that the fitting out of colonial cruisers would put an end to all difficulties; there had not yet been time to test the efficacy of this measure.

That is with reference to preventing raiding upon the islands and coasts. Then there is another statement there with further details, bringing it down to a later period.

The PRESIDENT.—Is the authority of this official gentleman acknowledged by the other party?

924 Sir CHARLES RUSSELL.—Yes, I thought I read a moment ago a passage in which, referring to the very pages I am reading from (pages 83 to 90)—the United States referred to these quotations in our Case.

The PRESIDENT.—I mean the quotations from the Russian official documents?

Sir CHARLES RUSSELL.—Yes, I thought the Tribunal would have appreciated my reference. I referred to page 24 of their Counter-Case,

in which, referring to the very passages I have been reading, they make this comment

Later, however, especially in the years following 1840, Behring Sea was actually visited, as pointed out at pages 83 to 90 of the British Case, by numerous vessels, mostly whalers, but it is shown by Bancroft, the author so frequently quoted by the British Government, that the whaling industry was not for the Russians a profitable one.

And this is their comment:

General FOSTER.—Would it be convenient for you to read page 255.

Sir CHARLES RUSSELL.—I will, if you like.

General FOSTER.—I should be glad if you would, in view of the President's enquiry, because it shows that we contradict distinctly the quotations, made.

Sir CHARLES RUSSELL.—I will read it if you wish. It says here:

But it is shown by Bancroft, the author so frequently quoted by the British Government, that the whaling industry was not, for the Russians, a profitable one, and there appears to have been no motive for protecting that industry by the imperial Ukase of the colonial government.

That is all the comment that is made so far. Then it goes on:

Bancroft is also referred to in the British Case (pp. 83 and 84) to show that in 1842 the Russian Government refused Etholin's request that Behring Sea be protected against invasions of foreign whalers, on the ground that the Treaty of 1824 between Russia and the United States gave to American citizens the right to engage in fishing over the whole extent of the Pacific Ocean. From what is said, however, by this same author immediately following the above citation, it appears that, through the endeavours of Etholin the Government at length referred the matter to a committee composed of officials of the navy department, who reported that the cost of fitting out a cruiser for the protection of Behring Sea against foreign whalers would be 200,000 roubles in silver, and the cost of maintaining such a craft 85,000 roubles a year. To this a recommendation was added that, if the company were willing to assume the expenditure, a cruiser should at once be placed at their disposal. Hence, according to Bancroft, the failure to protect Behring Sea can not be traced to the fact that the Russian Government considered it had lost the right to do so by the treaties of 1824 and 1825.

General FOSTER.—It was a question of money, not of right.

Sir CHARLES RUSSELL.—Could any thing be more absurd than this comment, which is gravely referred to as a comment impugning the accuracy of the excerpts from these official accounts? Where is the suggestion that these accounts are not accurate? What there is here is a suggestion that the failure to protect Russian rights was
925 owing to the fact that it would be too expensive to do it. That is the only suggestion that is made on this page.

General FOSTER.—Bancroft says so.

Sir CHARLES RUSSELL.—If he said so, it is cited in your case.

General FOSTER.—Quoting from your own author.

Sir CHARLES RUSSELL.—I think there must be a limit to these interruptions. I have gratified you so far, and have been pleased to be able to gratify you, because it is a strong point in favour of what I have been addressing the Tribunal upon. I have read the pages from the letters of the Foreign Minister in which he said: We have no right to do it: it will re-open the question between the British Government and the Government of America if we attempt to do it.

The PRESIDENT.—Is that all, General Foster, you wish to be read from the Counter-Case under the present circumstances?

General FOSTER.—As it appears the interruption is unwelcome, I will reserve it.

Sir CHARLES RUSSELL.—I assure you, it is not unwelcome—my friend is quite wrong. If I am reading anything, and there is any-

thing else which explains its meaning or puts a different meaning it, I shall always be willing to read it; but really to make this a f dation for stating that the United States had impugned the accu of our quotations, I must say, is absurd.

General FOSTER.—I understood Counsel just now to remark tha has read an authoritative declaration from the Russian Minister. will find that he read it from a historian.

The PRESIDENT.—That is quoted from the Foreign Office. It i inverted commas.

Sir CHARLES RUSSELL.—I beg General Foster's pardon. It ma my fault, but I thought I read "Tikhmenieff thus describes the re of these representations"; and then he proceeds to say: "The e words of the letter from the Foreign Office were as follows". Then words are given in inverted commas. Then on the next page—I h no doubt I was not expressing myself with sufficient clearness—he on in inverted commas to say "The Foreign Office expressly state follows in reply:

> We have no right to exclude foreign ships from that part of the Great O which separates the eastern shore of Siberia from the north-western shore of A ica, or to make the payment of a sum of money a condition to allowing them to whales.

Lord HANNEN.—Have you got "Bancroft" here? I do not mea the room, but for reference.

Sir CHARLES RUSSELL.—We have. It is quite available, and I send for it at any moment.

Now, I am loth to make a reference to a subject not pleasan either of us, and I will content myself with saying that certai those falsified documents relate to the period after the Trea
926 and consist, in large part, of interpolations suggesting that t had been interference by Russia, which would have been in sistent with its true action as we now know it to be. I con myself with saying that. They begin at page 60 of the original C and go on. I do not enlarge upon it.

Then there is one other thing I must say in this connection, a think it brings this matter practically to a conclusion. After the U of 1821, there were two confirmatory Charters granted to the Russ American Company, and the significant change in the language of t Charters, compared with the original Charter under the Ukase of 1 is itself significant and conclusive upon the point upon which I addressing you.

In order that this point may be appreciated, let me invite your at tion to volume I of the United States Appendix, at page 16, to loo what the terms of the original Ukase were.

> The pursuits of commerce, whaling, and fishery, and of all other industry o islands, ports, and gulfs, including the whole of the northwest coast of Ame beginning from Behring Straits to the 51° of northern latitude, also from the Ale Islands to the eastern coast of Siberia, as well as along the Kurile Islands Behring's Straits to the South cape of the Island of Urup, namely, to the 45 northern latitude, is exclusively granted to Russian subjects.

That is the 4th of September, 1821. There are provisions, as will recollect, for the confiscation of vessels that come within the li there set out. The Charter of 1821 is on page 24, and it concede the Company the privilege of hunting and fishing, to the exclusio all other Russian or foreign subjects, throughout the territories since in the possession of Russia, and then it describes the exte those territories in much the same language. Now, if you tur

page 27, you will find the document at the bottom of that page headed, "Confirmation of Charter of 1821". This confirmation was, in fact, published by the Senate on March 29th (April 10th) 1829, five years after the Treaty with the United States, and four years after the Treaty with Great Britain. If Russia was acting, as we assume she was, in good faith in the matter, you would expect to see a recognition of these Treaties, and of the fact of limiting the rights which could be properly granted to the different subjects, and, accordingly, you do find it on page 28.

The limits of navigation and industry of the Company are determined by the treaties concluded with the United States of America 5 (17), 1824, and with England February 16 (18), 1825.

In all the places allotted to Russia by these Treaties there shall be reserved to the Company the right to profit by all the fur and fish industries, to the exclusion of all other Russian subjects.

You see the change at once. Then comes Article VII.

All the articles of these rules and of the privileges published together with them, which are not limited by the aforesaid Treaties, and which are not contrary to the Ukase of October 14th, 1827, concerning outrance into service, shall remain in full force.

Therefore, it is the clearest recognition that they had no longer
927 the right to exclude foreigners from the pursuit of fishing, because the power in the first was exclusive of all other Russian and of all foreign subjects. In the confirmatory Charter of 1829, it is Russian subjects only; and the powers granted to Russian subjects are to be determined and limited by the effect of those Treaties.

Mr. Justice HARLAN.—Do you construe that to mean that Russia intended foreign subjects to profit in the fur and fish industries which would otherwise belong to Russia?

Sir CHARLES RUSSELL.—No; I have said nothing that would bear that meaning. In the Treaty, so far as there were exclusive rights given, of course, she had a right to deal with them; but I deal with the one point only, and do not want to be led away to others, of the recognition of the right of the subjects of Great Britain and of the United States to fish in the Behring Sea; that under the terms of the Charter of 1821, six days after the date of the Ukase, in the whole area, embracing and including Behring Sea, there was an exclusion of all foreign subjects and of all Russian subjects; but, in the confirmatory Charter of 1829, there is the omission of the exclusion, as far as the Treaty affects the area, of foreign subjects altogether.

Mr. Justice HARLAN.—I think I ought to say that I have no desire to lead Counsel to other subjects; my only wish was to follow out the matter to which he referred, as I supposed.

Lord HANNEN.—And I am bound to say I have the same difficulty as Mr. Justice Harlan. That is plainly confined to the exclusion of all Russian subjects in places allotted to Russia.

Sir CHARLES RUSSELL.—Clearly.

The PRESIDENT.—The ten-year clause, I suppose.

Sir CHARLES RUSSELL.—Yes. May I respectfully beg Mr. Justice Harlan's pardon; I am sure I did not mean to convey that I did not desire the question to be put. I thought I had made my meaning clear.

So in the Confirmatory Charter of 1844, on page 28, dated the 10th of October, 1844, Article II says.—

The limits of the navigation and trade of the Company on the shore of the Continent and on the Islands of Northwestern America,——

and it repeats the course of the line of demarcation in the Treaty between Great Britain and Russia; and then, in section 3, it provides:

> In all places annexed to Russia by the above-mentioned delimitation there is granted to the Company the right to carry on the fur and fishing industries to the exclusion of all Russian subjects.

I do not think there is anything else in that which it is important to draw attention to.

Now, I have practically dealt with both branches of Article I. The Tribunal will observe that it contains two divisions: first, what exclusive jurisdiction in the sea known as Behring Sea did Russia
928 assert and exercise, and what exclusive rights in the seal-fisheries did Russia assert and exercise? I have incidentally, of course, addressed myself to both questions. I want to say one word, however, about the question of the exclusive right in the seal fisheries.

Mr. Justice HARLAN.—Before you go to that, Sir Charles, let me make one enquiry so that I may get your view fully.

We are required in the first question to answer what exclusive jurisdiction Russia asserted and exercised. If I remember rightly, both M. de Poletica in his letter to Mr. Adams, and Baron Nicolay in his letter to Lord Londonderry or Count Lieven, said that Russia, if it deemed proper, could declare the whole of the Ocean, the Pacific Ocean, *mare clausum;* but they did not intend by such Ukase to assert any such right, but only limited their declaration to particular localities. Now, do you contend that in answering that question we should regard this announcement of Russia of its right, if it thought proper, to exercise this exclusive jurisdiction over these waters, as an assertion within the meaning of the Treaty?

Sir CHARLES RUSSELL.—Certainly, an assertion.

Lord HANNEN.—But not an exercise?

Sir CHARLES RUSSELL.—But not an exercise. I will formulate in precise language what we submit ought to be the answers to each of these four questions.

I was saying a word about what exclusive rights in the seal-fisheries did Russia assert and exercise. Upon this there does not seem to be any room for question. Russia was the territorial owner of the Pribilof Islands. Russia exercised the rights of territorial ownership upon those Islands, and had the rights, whether she exercised them or not I know not and care not, but the right to exercise them exclusively of all other persons and Powers, not only on the Islands, but within 3 miles of the coast of the Islands. There is no suggestion that Russia, as regards the seal fisheries, made at any time any assertion greater than or different from the assertion which she would be justified in making as territorial owner. I find none. My learned friends would answer that, and, as I conceive, quite rightly, by saying that there was no need for her to assert any right outside, because pelagic sealing had not got to such dimensions as to call for her interference. That I do not propose to deal with at this stage of the argument at all, because it would embrace the more wide and general question of what right she could have asserted in point of fact, which is not the point touched by question 1. It is not the question of what right she had in fact, it is what right she asserted and exercised. I will consider whether she could have any right. Of course, the Tribunal knows I assert that she could not, except the rights that belong to her as territorial owner,—rights *ratione soli;* the exclusive right to take what was upon her territory, the right to exclude anybody else from that territory; and a similar

Nature of the exclusive right in the seal fisheries exercised by Russia.

right extending to the maritime belt of three miles beyond her territory.

929 Senator MORGAN.—As to that marginal belt, I understood you to say a moment ago that Russia at that time said that the Nations had not agreed to the 3-mile limit as a matter of international law.

Sir CHARLES RUSSELL.—In order that the Tribunal may follow this exactly, I will repeat the question that you, Sir, have been good enough to address to me in relation to my limitation of the 3-miles on the coast: you suggest to me that, in one of the communications from Russia, it had been stated that the 3-mile marginal belt was not then determined, or fixed or universally agreed upon limit of territorial waters.

I think there is truth in that suggestion. It was, to a greater or less extent, indeterminate. It was I think generally fixed at the length to which cannon-shot could be carried, and that may have varied more or less; but it is quite true to say that at that time it was not quite clearly fixed, whether it was 3 miles, or 4 miles, or 5 miles, but beyond that there was no difference. There was a certain marginal belt, the precise limit of which has in later years come to be recognized at 3 miles, or a marine league.

The PRESIDENT.—It has no relation to our subject, and perhaps it would be better not to press that question too tightly even to-day.

Sir CHARLES RUSSELL.—No, because as the power of arms is increased, it may be the application of that principle *terræ dominium finitur ubi finitur armorum vis* may receive a greater expansion. It is not a question, I would venture to say, that need trouble us. It is admitted that there is a marginal belt which to-day may be indeterminate, but indeterminate only within narrow and confined limits.

Senator MORGAN.—Then, I take it, it was entirely indefinite how far Russia claimed at that time jurisdiction in a territorial sense in Behring Sea.

Sir CHARLES RUSSELL.—Do you mean before or after the Ukase?

Senator MORGAN.—At that time.

Sir CHARLES RUSSELL.—There is a great difference. It is clear that by the Ukase if that had been persisted in she claimed territorial jurisdiction over the whole of Behring Sea. As I have pointed out she was insisting on 100 miles from the land, which 100 miles from the land would have shut Behring Sea and made it a *mare clausum*.

Mr. Justice HARLAN.—May not that throw some light on the fact, which struck me in the correspondence, that Mr. Canning did not at any time mention the Behring Sea or the Sea of Kamschatka, but seemed to have constantly in his mind keeping open Behring Straits, because if the 100-mile limit was enforced that would close Behring Strait. Of course he must have proceeded on the ground that Russia disclaimed any purpose of keeping foreign vessels out of the open waters of Behring Sea. They could not get out to the Arctic Ocean unless Behring Straits were open.

Sir CHARLES RUSSELL.—With deference that is not what the correspondence shews, because the question of Behring Straits being
930 closed comes up in relation to a different subject—the access to the Arctic Ocean beyond it.

Mr. Justice HARLAN.—Mr. Canning said—We cannot get to the Arctic Ocean with vessels of discovery unless we go through Behring Straits.

Sir CHARLES RUSSELL.—True he uses the reference in a very significant way. He says the Power that could propose to itself the notion of treating the Pacific Ocean as *mare clausum* might think it right to close Behring Straits, which is only 48 miles wide. That the Ukase

involved the assertion of territorial dominion over Behring Sea is made apparent also by the statement of M. Poletica justifying the Ukase on the ground that they were entitled to treat it as a *mare clausum*, *mer fermée*, but they did not intend to push their rights to that length, losing sight of the fact that pushing their rights of sovereignty to 100 miles from the coast did, it was insisted on, effectually close Behring Sea up. And that that was a claim of territorial sovereignty is clear from the opinion of the King's Advocate, which I read, and also the more important opinion of Lord Stowell, that a right to prevent people coming over any land covered by water is necessarily an assertion of territorial dominion over that water.

Mr. Justice HARLAN.—The language of Lord Stowell is, the territories claimed are of different species, islands, portions of the Continent, and large portions of the sea adjoining.

Sir CHARLES RUSSELL.—Quite right, Sir, and Behring Sea would be a very large portion of the sea adjoining, and that would make the point stronger. He was regarding it as 100 miles from the coast. He says that is territorial jurisdiction over 100 miles from the coast.

Mr. Justice HARLAN.—I do not say you are not right; I only wanted to see what your view was.

Sir CHARLES RUSSELL.—I do not think it could be contended by the other side that, if a Power asserts an exclusive right to possession of a certain area of land covered by water, and says, we have the right to exclude anybody else from coming in that area, that that is anything but an assertion of territorial jurisdiction over that area.

Mr. CARTER.—My argument was distinctly the other way.

Sir CHARLES RUSSELL.—I confess, it astonishes me to hear it.

Mr. CARTER.—I only seek to correct a misapprehension.

The PRESIDENT.—And of course it is correct for Counsel to acknowledge that they did not argue the point in that way. I think they stand on the same ground as you do. They do not argue the point of jurisdiction as to the first question. [*To Mr. Carter*] I do not understand in your argument you called upon us to decide that the rights claimed or exercised by Russia were rights of territorial jurisdiction.

Mr. CARTER.—We do not. The interpretation that I put in my argument on the Ukase was that it was not an assertion of territorial dominion over the sea, but a mere assertion of a right to protect a shore industry by protective measures stretching over the sea.

Sir CHARLES RUSSELL.—Then we agree as to the first question.

931 The PRESIDENT.—It is a relief to us to believe you do. You do not deny historically, that is as a point of history, that Russia asserted these territorial rights of jurisdiction, which, upon my impression at first sight (though I do not express any definite opinion of my own) according to the despatches of M. de Poletica and Baron Nicolay and Count Nesselrode, seem to be expressly reserved by Russia.

Mr. CARTER.—I do not quite understand the suggestion of the learned President.

The PRESIDENT.—In the diplomatic despatches of M. de Poletica and Baron Nicolay and of Count Nesselrode, the Minister of Foreign Affairs, the Russians declared that they might have the right of considering the sea between the two coasts of Asia and America, that is to say, not only Behring Sea but a great portion of the North Pacific Ocean, as being a *mare clausum;* that is to say, a sea on which they have the rights of territorial sovereignty. I say you did not touch that point in your argument.

Mr. CARTER.—I said in reference to that, that while they declared that they might have asserted that right, they expressly declared, or

what I understood as expressly declared, that they did not intend to assert it; that the measure was designed as a preventive one. That is to say, it was as I understood it for the purpose of protecting a shore industry; that they did not intend to assert territorial dominion over Behring Sea, although they said they might assert it.

The PRESIDENT.—That they might assert it if they chose to do so?

Mr. CARTER.—If they chose to do so; but that they did not choose to assert it by the Ukase.

The PRESIDENT.—There is some doubt as to the use of the word "assert". I think you use the word "assert" in a different meaning from what Sir Charles does.

Mr. CARTER.—They said they might assert it, and assert it rightfully. There is no doubt about that.

The PRESIDENT.—They did not mean to exercise it?

Mr. CARTER.—They did not mean even to assert it.

Sir CHARLES RUSSELL.—Mr. President, there is a latent ambiguity in my friend's statement which must be cleared up. I began, in order to avoid that ambiguity, by giving to this Tribunal what I conceived to be the meaning of that first question, in order to show that when "right" and "exclusive jurisdiction" were there referred to, it did not mean the general inherent right which a nation has to protect its property or its interests, which I will discuss hereafter, but that the question was pointed to whether Russia had asserted and exercised territorial jurisdiction.

Let me recur to that point, which I now see I was quite right in endeavouring to make clear at the beginning of the discussion. I pointed out that a right of defence of property or interest was not an exclusive right. The word in the question is "exclusive". I pointed out further that still less was it an exclusive right of jurisdiction
932 in a defined area, because I pointed out that a right of defence or protection of property or interest knew no circumscription of space except where the property to be defended was, where the interest to be defended was. I was not then discussing whether there were the rights which my learned friend professes exist in that regard. I was assuming them for the moment. Thereupon I proceeded to point out, and I hope established, that what the question meant was whether Russia had or had not asserted a sovereign authority exclusive of all other persons, and in a defined and definite area, namely, Behring Sea; and I made that out—at least I thought I made it out—by saying that the case of the United States had been built up on that theory by the use, amongst other things, of these documents which have proved to be unreliable. I made that out by showing the legislative enactments of the United States Congress, based upon its derivative title. I further made that out by the mode in which they have invoked that municipal authority, as a municipal authority exercisable in a definite area. And finally I made that out by the libel in the Court; by the argument of their counsel; by the argument before the Supreme Court at Washington, and by the appreciation of that argument and position as expressed by the Judges of that High Court.

The PRESIDENT.—That is perhaps more of historical than of practical interest to the question which is laid before us.

Sir CHARLES RUSSELL.—I think myself it is important, as I take the liberty of saying, because of its far-reaching consequences. My argument has been, from first to last, that every one of these assertions up to the time we came into Court—practically every one of these assertions—is based on the territorial claim of the United States: question

five as well as questions one, two, three, and four. But I do not wis to anticipate. The point I am upon is this: you have, with grea deference, to answer the question in the sense in which you understan that question; and the sense in which that question is to be unde stood, I am respectfully submitting, is that the Tribunal is asked t say whether Russia asserted and exercised—and I repeat my word asserted and exercised—territorial or sovereign authority, exclusive c all other persons, in the Behring Sea. That is the question to whic you have to make your answer.

The PRESIDENT.—Certainly; one of the questions.

Sir CHARLES RUSSELL.—As to the question of exclusive rights i the seal fisheries, I have already dealt with that, and I cannot see tha there is much room for discussion or difference between us. There i no suggestion that Russia either asserted or exercised any rights i relation to seal fisheries other than those that belonged to her, *ratione soli*, as owner of the Pribilof Islands.

Mr. Justice HARLAN.—The difference between counsel, then, i respect to this finding, I understand to be this: You assert that Russia in these different ways you have pointed out, did assert, within th meaning of that question, exclusive jurisdiction in the whole o
933 Behring Sea by this Ukase. On the other side, it is contende that Russia did not assert such exclusive jurisdiction by tha Ukase, but expressly disclaimed a purpose to assert it.

Sir CHARLES RUSSELL.—So I understand. But again, Judge, wit great deference, that statement illumines the point with which the Tribunal must still deal, as to what is the meaning of the question.

Mr. Justice HARLAN.—I understand that.

Sir CHARLES RUSSELL.—And my point is—and I submit I have demonstrated it—that when "exclusive jurisdiction" is spoken of, it means exclusive jurisdiction in Behring Sea; and an exclusive jurisdiction in Behring Sea means exclusive jurisdiction in a particular and defined area; and that exclusive jurisdiction in a particular and defined area means territorial or sovereign jurisdiction, and nothing else. Of course if I am to argue the question again as to what the Ukase meant, I should have to go over the ground with which you are very familiar.

Mr. Justice HARLAN.—I think we all understood your argument.

Sir CHARLES RUSSELL.—That I am not going to do; but how it can be contended that when it is stated in the Ukase of 1821,

> the pursuits of commerce, whaling and fishery, and of all other industry on all islands, ports and gulfs, including the whole of the northwest coast of America, beginning from Behring Straits to the 51st degree of Northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring Strait to the South Cape of the Island of Urup, viz, to the 45 degree 50 minutes northern latitude, is exclusively granted to Russian subjects:—

and when in furtherance of that exclusive grant it is prohibited to al foreign vessels to approach within less than one hundred Italian miles subject to confiscation:

How those two, taken together, can be anything less than, or differen from, an assertion of territorial sovereignty, with a sanction to suppor that territorial sovereignty, passes my comprehension. And that wa the case originally made by the United States. I will leave the subjec by citing one more passage from their Case, page 69. This makes i apparent, unless I am greatly mistaken. It is near the top of page 69

> From the foregoing historical review it appears:
>
> First. That prior and up to the date of the Treaties of 1824 and 1825, Russia di assert and exercise exclusive rights of commerce, hunting and fishing, on the shore and in all the waters of Behring Sea.

Second. That the body of water known as Behring Sea was not included in the phrase "Pacific Ocean" as used in the Treaty of 1825.

What does that mean? It means that there was nothing in those Treaties which interfered with Russia's assertion and exercise of exclusive rights in Behring Sea mentioned in paragraph one.

Third. That after said Treaty of 1825, the Russian Government continued to exercise exclusive jurisdiction over the whole of Behring Sea up to the time of the cession of Alaska, in so far as was necessary to preserve to the Russian-American Company the monopoly of the fur-seal industry, and to prohibit the taking on the land or
934 in the water by any other persons or companies the fur-seals resorting to the Pribilof Islands.

As I have pointed out, there is not a trace of evidence which relates to the question so far as fur-seals are concerned.

But here again my learned friend Mr. Carter, as I respectfully think, is confusing the motive of this attempted legislation by Russia with the effect. The motive may have been to protect this, that or the other; but the fact was that it asserted territorial sovereignty.

I will bring out my meaning, in concluding this branch of the question, by formulating precisely the answers which I submit the Tribunal ought to give to these four questions. They are formulated with some care and at length at page 26 of our printed Argument:

The foregoing facts and arguments, it is submitted, conclusively establish that the following answers should be given to the first four questions in article 6 of the Treaty of Arbitration.

To question one. That Russia exercised no exclusive jurisdiction in Behring Sea prior to 1867; that in 1821 only, Russia asserted exclusive jurisdiction over a part of Behring Sea along its coasts, but that she withdrew the assertion, and never afterwards asserted or exercised such jurisdiction.

Mr. Justice HARLAN.—What do you mean by the phrase there, "over a part of Behring Sea"?

Sir CHARLES RUSSELL.—That is the hundred miles which is mentioned in the Ukase. We might have treated M. Poletica's letter as an assertion of authority over the whole of Behring Sea, and I think we should have been well founded in doing so; but we preferred to take the legislative act, which speaks of one hundred miles.

Mr. Justice HARLAN.—I do not understand that answer to include the idea that Russia asserted exclusive jurisdiction over the whole of Behring Sea by the Ukase of 1821.

Sir CHARLES RUSSELL.—I do not think it necessarily means that. What the framers of these answers have done is this: They might according to the statement of M. de Poletica, or according to the effect of the Ukase, perhaps have been justified in adopting the claim of dominion over the whole of Behring Sea; but what they have been content with doing was to rely upon the legislative act itself, the Ukase: and as the Ukase made the limit of 100 miles, to state that in the terms of the Ukase itself. I say therefore that this is literally the correct answer to question one:

That in 1821 only Russia asserted exclusive jurisdiction over a part of Behring Sea along its coasts, but that she withdrew the assertion, and never afterwards asserted or exercised such jurisdiction.

That Russia exercised no exclusive rights in the seal fisheries in Behring Sea prior to 1867; that in 1821, only, Russia claimed exclusive rights, as included in her claim of jurisdiction extending to 100 miles from the coast, but that she withdrew the assertion and never afterwards asserted or exercised such rights. The only exclusive right which Russia subsequently exercised was the right incidental to her territorial ownership.

To question two. That Great Britain neither recognized nor conceded any claims by Russia of jurisdiction as to the seal fisheries, i. e., either (a) of exclusive
935 jurisdiction in Behring Sea, or (b) exclusive rights in the fisheries in Behring Sea, save as already mentioned.

That is to say, saving the rights incidental to territorial ownership.

To question three. That Behring Sea was included in "Pacific Ocean" in the Treaty of 1825; that Russia neither held nor exclusively exercised any rights in Behring Sea after the Treaty of 1825, save only such territorial rights as were allowed to her by international law.

To question four. That no rights as to jurisdiction or as to the seal fisheries in Behring Sea east of the water boundary in the Treaty between the United States and Russia of the 30th March 1867, passed to the United States under that Treaty, except such as were incidental to the islands and other territory ceded.

Those are the answers which we say we have by the argument that I have submitted established as the correct answers to be given to each of these four questions.

Senator MORGAN.—There are seven or eight answers there to four questions, as I understand it.

Sir CHARLES RUSSELL.—As a matter of fact there are four answers to four questions. There is the precise number of answers to the precise number of questions.

Now, sir, I have, I am happy to say, got to the end of that; and I really feel—or I did feel until my friend's interposition—that I ought to offer an apology for taking so long to demonstrate what we humbly submit is very easily made clear.

The PRESIDENT.—We will come next to the fifth question.

Sir CHARLES RUSSELL.—Yes, Sir.

The Tribunal here adjourned for a short time.

THE FIFTH QUESTION.

Sir CHARLES RUSSELL.—Mr. President, I now proceed to address myself to the consideration of what the answer of the Tribunal ought to be to the 5th question of Article VI; and in order to assist the Tribunal in formulating that answer, it is obviously necessary, in the first place, as I have thought it necessary in the case of the first four questions, to endeavour to fix what is the meaning of the question itself, because, unless the question itself is clearly understood, it cannot be seen what is the proper and definite answer to the question. Now, in order to convey to the Tribunal the meaning which I submit is the correct one, I have to call your attention to what I understand to be the general suggestion or meaning put upon it by my learned friends on the other side, and I wish to state to the Tribunal how I propose to deal with the matter. I propose in the first place to state and to justify, if I can, the meaning which I attach to the question.

I cannot, of course, venture to assume that that is the construc-
936 tion which the Tribunal will attach to it; and, therefore, I shall proceed to consider what ought to be the answer assuming that my construction is wrong, and that put by the other side is right. Now, speaking broadly, the construction put by the other side is this, that the Tribunal is asked to say what right of protection or of property of any kind, the United States possesses in respect to seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit. They put their interpretation in various ways: first, what right is there in the individual fur-seal? although they say it is not necessary for them to put the right so high as that: secondly, if they have not property in the individual fur-seal, what right of property is there in what they are pleased to call the fur-seal herd? and, again, they say it may not be necessary to put it even so high as that. And, finally, if they have no property in the individual

seal, nor any property in the herd, what right in the nature of a property right is there in the industry carried on by means of the fur-seals upon the Pribilof Islands? They say that in one way or other of those three forms question 5 is addressed to the question of property: either in seals, in the herd, or in the industry; and that the right of protection there referred to is such right of protection as a nation may exercise, according to international law, in defence of its property in the seals, or in the herd, or in the industry founded upon them.

Now I think I have stated correctly the various modes in which their suggestions are made. I shall consider those, and assume that they are right in their construction of the meaning of the question, but I have first to say that I dissent entirely from that as being the meaning of the question. *I dissent from the suggestion that it is either the right of property or the right of protection that is intended to be covered by that fifth question.* Then I shall be asked, and properly asked, what is my construction of that question? *Does it mean property and right of protection in the fur-seals frequenting the Behring Sea wherever those fur-seals are to be found? I say, no.* It is a question just like Questions 1, 2, 3, and 4, at the bottom of which is the assertion of exclusive jurisdiction; *and therefore* (I am now indicating the point, not arguing it: I will justify it presently), *that as the main volume and strength of their case was presented and is presented in the correspondence, the property right indicated in Question 5 is the exclusive right to take fur-seals in the Behring Sea; that is to say, a property right of an exclusive character in the fishery in the Behring Sea and not in the seals either as individuals or as a herd,—in other words, an exclusive right to take fur-seals in Behring Sea, to prevent anyone else taking them in Behring Sea,—in other words, the assertion of a property right of an exclusive character in the fishery in Behring Sea, and not in the individual seals or in the herd.*

Question raised by question 5 is one of exclusive jurisdiction in Behring sea.

How is this position made clear? In the first instance, the reference in the opening words of Article VII shew that the framers of the Treaty designed to treat article V, like the preceding questions, as a question of exclusive jurisdiction, because the words of article VII are:

937

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary:

Then the question of Regulations is to arise; and it is not argued, it could not be argued, therefore, that question 5, as it stands in this Treaty, was not intended to raise a question of exclusive jurisdiction. That exclusive jurisdiction would be the exercise of the right to which I have already adverted, the exclusive right to take the seals in the Behring Sea and, accompanying that right and in protection of that right, exclusive jurisdiction in the eastern part of Behring Sea, for the protection of that right.

Now, how is that made apparent? I have referred to the language of Article VII; I have now to refer to the 5th article of the *Modus Vivendi* of 1892. That Article deals with what is to be the effect on the question of compensation should the right of Great Britain be affirmed, or should the right of Great Britain to take seals be negatived.

Senator MORGAN.—You mean British subjects; not the Government of Great Britain?

Sir CHARLES RUSSELL.—*Yes, certainly; I mean British subjects, because it runs thus—If the result of the Arbitration be to affirm the right*

of British sealers to take seals in the Behring Sea within the boun claimed by the United States, that is the eastern part of Behring S under its purchase from Russia, then compensation is to be made by t United States; if, on the other hand, the result of the arbitration is deny the right of British sealers to take seals within the said waters, th compensation is to be made by Great Britain to the United States.

And I point out *that if question 5 was intended to touch or to raise question of property in the individual seals, or in the herd of seals as th have been called, or in the industry founded on those seals, the limitatio as to compensation could not have been restricted to the mere question o the right to take seals in Behring Sea; because property is property, an if the property in the fur-seal is affirmed to be in the United States, I agre most entirely with the argument of Mr. Carter that that right of propert is not lost because possession of the thing is lost.*

The rights of property attach to a thing wherever the thing is; so a to the herd, so as to the industry; and what makes this point clear is that we have now upon the question of Regulations the argument put forward that in truth the greatest injury that is done to the seals as individuals, to the seals as a herd, to the industry carried on, or said to be carried on in relation to them, *is done outside Behring Sea and in the approaches to the Aleutian passes; and yet the limitation as to compensation is to depend simply upon "aye" or "no", is there a right in the British subject to take seals in Behring Sea within the bounds claimed by the United States under its purchase from Russia.*

938 Senator MORGAN.—That is not the compensation that is provided in the *Modus Vivendi*. That compensation is provided, because the Government has taken this subject up, and it is a question between the Governments as to damages under the *Modus Vivendi*, because of their intervention in the matter of seal hunting or fishing, to prevent it.

Sir CHARLES RUSSELL.—I quite agree, but I do not see how that weakens the force of my position.

Senator MORGAN.—I do not say that it does at all.

Sir CHARLES RUSSELL.—The two Governments, of course, are merely representatives of the interests of their respective nations.

Senator MORGAN.—This is the first time they assumed to be so They made the *Modus Vivendi* and agreed to submit the damages arising out of that fact to the Arbitrators.

Sir CHARLES RUSSELL.—That may be. I am not concerned to dispute that. My point, of course, is this, that if the framers of this Treaty had any idea of raising before this Tribunal the question as it is now presented, *of individual property in the seals or in the seal her or in the industry founded upon it*, the Article dealing with the questio of compensation *ought not to have been restricted, could not legally ha been restricted, merely to killing within Behring Sea, especially as it apparent, according to the allegation made on the other side, that the great portion of the mischief is done outside Behring Sea.*

Mr. Justice HARLAN.—May that not be explained in part by th fact that that relates to damages for abstaining from the exercise that right, during the pendency of the Arbitration, to take seals ou side Behring Sea?

Sir CHARLES RUSSELL.—That is exactly what I am pointing out. it was intended to say *there was a right in the individual seals outsi Behring Sea, or in the herd outside Behring Sea, or that the industry coul be affected by anything outside Behring Sea, then the limit of compensa tion would not have been put as it is in the 5th Article.* That is exactl *my argument;* but, of course, I am only beginning my justification c

this meaning, because the Tribunal must be good enough to bear in mind,—I have in all conscience recurred to it often enough, and I am afraid, so as to weary the Tribunal,—that my contention is this, that the whole case of the United States actually presented in the diplomatic correspondence *was a case founded primarily upon territorial dominion and jurisdiction in the eastern part of Behring Sea.* The case based upon their municipal legislation—the case advanced in the Courts, inferior and superior—the case based on the Executive action—based on the instructions and argument of their counsel—based on the reasons on which they invoked the authority of their municipal Tribunals—based on the arguments presented to the Supreme Court—based on the judgments of those Supreme Courts, was a case founded upon this territorial dominion. I am not saying that there is not in the Case and Counter-Case put forward by the United States Counsel a
939 different interpretation. I am dealing with the Treaty, with the conduct of the United States and their advisers, and with the diplomatic correspondence up to the date of the Treaty. And now I turn to that correspondence for one moment, though not at any great length. I begin with an important letter of Mr. Blaine, frequently referred to, of the 17th Dec., 1890, which is at page 263 of the large volume of the United States correspondence. I am not going to trouble the Tribunal with the whole of that letter.

On the 2nd of August 1890, the Marquis of Salisbury had written to Sir Julian Pauncefote the letter of that date, to which I do not think I need refer, in which the Marquis of Salisbury says as you well recollect, Sir:

> You will state that her Majesty's Government have no desire whatever to refuse to the United States any jurisdiction in Behring Sea which was conceded by Great Britain to Russia, and which properly accrues to the present possessors of Alaska

and so on.

Now on the 17th December Mr. Blaine's letter is written, in which that passage occurs to the effect that: If Behring Sea was included in the phrase Pacific Ocean, then there is no ground of complaint; and towards the end of which he invokes some general considerations based upon, I think, Mr. Phelps' letter of September 1888. But the part I am now upon is this. He says in that letter—I am reading from page 285 of volume I of the Appendix to the United States Case:

> It will mean something tangible, in the President's opinion, if Great Britain will consent to arbitrate the real questions which have been under discussion between the two Governments for the last four years. I shall endeavour to state what, in the judgment of the President, those issues are.

And then he formulates a number of questions. Then he says, in the preceding paragraph to the one I have just read:

> The second offer of Lord Salisbury to arbitrate, amounts simply to a submission of the question whether any country has a right to extend its jurisdiction more than 1 marine league from the shore.

Then he says:

> Her exception placed an obstacle in the highway between continents. The United States, in protecting the seal fisheries, will not interfere with a single sail of commerce on any sea of the globe.

Then he proposes questions 1, 2, 3 and 4, all of which deal, as it is conceded, with the questions of exclusive jurisdiction and exclusive rights, and then he proceeds:

> Fifth. What are now the rights of the United States as to the fur-seal fisheries in the waters of the Behring Sea outside of the ordinary territorial limits, whether

such rights grow out of the cession by Russia of any special rights or jurisdiction held by her in such fisheries or in the waters of Behring Sea, or out of the ownership of the breeding islands and the habits of the seals in resorting thither and rearing their young thereon and going out from the islands for food, or out of any other fact or incident connected with the relation of those seal fisheries to the territorial possessions of the United States.

940 Now, shortly stated, that question is briefly this: What are now the rights of the United States as to the seal fisheries in the waters of Behring Sea outside the ordinary territorial limits, however such rights have arisen. *Seal fisheries in the waters of Behring Sea:* those are the words.

In further elucidation of that same meaning, I may point to question 6 which he suggests shall be as follows:

If the determination of the foregoing questions shall leave the subject in such position that the concurrence of Great Britain is necessary in prescribing regulations for the killing of the fur seal in any part of the waters of Behring Sea, then it shall be further determined: First, how far, if at all, outside the ordinary territorial limits it is necessary that the United States should exercise an exclusive jurisdiction in order to protect the seal for the time living upon the islands of the United States and breeding therefrom. Second, whether a closed season (during which the killing of seals in the waters of Behring Sea outside the ordinary territorial limits shall be prohibited) is necessary to save the seal fishing industry, so valuable and important to mankind, from deterioration or destruction—

and so forth.

Now in the answer on page 290 of the same volume, Lord Salisbury, writing to Sir Julian Pauncefote on February 21st, criticizes these questions. As to the 5th question he says, at page 294,

The first clause, what are now the rights of the United States as to the fur seal fisheries in the waters of the Behring Sea outside of the ordinary territorial limits? is a question which would be very properly referred to the decision of an Arbitrator.

Now I pass on. The next letter to which I desire to refer, is from Sir Julian Pauncefote to Mr. Wharton, on page 326. There, Sir Julian Pauncefote writing to Mr. Wharton says:

Either Government may submit to the Arbitrators any claim for compensation which it may desire to prefer against the other Government in respect of any losses or injuries—

You will observe the large words in which Sir Julian Pauncefote proposes the reference.

any losses or injuries in relation to the fur-seal fishery in Behring Sea.

And so on.

Mr. Wharton replies on the 23rd of July, at page 326. He replies proposing instead this clause, which you will see printed in small type on page 398.

The Government of Great Britain having presented the claims of its subjects for compensation for the seizure of their vessels by the United States in Behring Sea

that matter is to be referred to the Arbitrators. Then I go on, next, to the letter of Mr. Blaine to Sir Julian Pauncefote of the 4th of May 1891. This is distinctly in relation to the *Modus Vivendi.* It is at page 301. Mr. Blaine there writes proposing the following arrangement.

The Government of the United States limits the number of seals to be killed on the islands, for purposes just described, to 7,500.

941 The Government of the United States guarantees that no seals shall be killed in the open waters of the Behring Sea by any person on any vessel sailing under the American flag or any American citizen sailing under any other flag.

The Government of Great Britain guarantees that no seals shall be killed in the open waters of the Behring Sea by any person.

and so on.

Now on the 3rd June 1891 at p. 305 this is the proposal which Her Majesty's Government puts forward for a *modus vivendi*.

The Government of Great Britain and of the United States shall prohibit, until May, 1892, the killing of seals in Behring Sea or any islands thereof, and will, to the best of their power and ability, insure that subjects and citizens of the two nations——

and so on.

And Mr. Wharton, on the following day replies in the letter which is at page 306, and which will be found to be very important in this regard. He says:

I am directed by the President to say, in reply to your note of the 3rd instant, conveying to the Government of the United States the response of Her Majesty's Government to the proposal of Mr. Blaine for a *modus vivendi*, relating to the seal fisheries in Behring Sea during the present season——

First. In place of the first and second subdivisions of the agreement, as submitted to you, the President suggests the following:

(1) The Government of Great Britain shall prohibit, until May 1892, the killing of seals in all that part of the Behring Sea lying east, eastwardly, or southeastwardly, of the line——

that is the line of demarcation.

Then:

(2) The Government of the United States shall prohibit, until May, 1892, the killing of seals in that part of Behring Sea above described——

and so on.

He then proceeds, in the next paragraph, to say:

These changes are suggested in order that the *modus* may clearly have the same territorial extent with the pending proposals for arbitration;

You observe the words "these changes"—that is to say the limitation to the eastern part. You will observe the counter proposal was general—"*all* killing in Behring Sea". Says Mr. Wharton: We change that to "the eastern part of Behring Sea".

These changes are suggested in order that the *modus* may clearly have the same territorial extent with the pending proposals for arbitration.

Then, near the middle of the third paragraph of that letter, he says:

The fourth clause of the proposal of Her Majesty's Government, limiting the taking effect of the *modus vivendi* upon the assent of Russia, presents what seems to the President an insuperable difficulty——

and so on

942 Then he says:

He is surprised that this result did not suggest itself to Lord Salisbury, and does not doubt that it will be apparent to him on a re-examination.

Then comes this important passage: I respectfully ask attention to this language:

I am also directed to remind you that the contention between the United States and Great Britain has been limited to that part of Behring Sea eastward of the line of demarcation described in our convention with Russia——

and so on.

Then the final sentence in that paragraph is in these words:

It was never supposed by any one representing the Government of the United States in this correspondence or by the President, that an agreement for a *modus vivendi* could be broader than the subject of contention stated in the correspondence of the respective Governments.

In other words, it is limited to the eastern part of Behring Sea, and cannot go outside the eastern part of Behring Sea, and it never

occurred—it was never supposed by anyone representing the Government of the United States—that the *Modus Vivendi* could be broader than the subject of contention. Now in the next sentence he says:

Negotiations for an Arbitration have been proceeding between the United States and Great Britain, and if these Powers are competent to settle by this friendly method their respective rights and relations in the disputed waters——

always a limitation of area——

upon a permanent basis, it would seem to follow that no question could arise as to their competency to deal directly with the subject for a single season. If Great Britain now insists upon impossible conditions, viz, that the conclusion of a *modus vivendi* is to be delayed until and made contingent upon the assent of Russia to stop the killing of seals on its own islands and in its own waters, and upon the exercise by the President of powers not conferred by law, this would be, in his opinion, a practical withdrawal by Great Britain from the negociations for a *modus vivendi*——

and so on.

Then comes the memorandum from Sir Julian Pauncefote, with which I do not think I need trouble you. But, finally, on the 9th of June, Mr. Wharton wrote proposing the *Modus Vivendi* which was ultimately actually adopted; and in the letter on the subject you will find this passage, on page 312.

As to the third clause of your proposition, I am directed to say that the contention between the United States and Great Britain has relation solely to the respective rights of the two Governments in the waters of Behring Sea, outside ordinary territorial limits, and the stipulations for the co-operation of the two Governments during this season have, of course, the same natural limitation. This is recognized in Articles I and II of your proposal——

and then he goes on to argue the point.

Then comes the Agreement, which he sets out at page 313.

An Agreement between the Government of Her Britannic Majesty, and so on,
943 for the purpose of avoiding irritating differences, and with a view to promote friendly settlement of the questions pending between the two Governments touching their respective rights in Behring Sea and for the preservation of the seal species, the following Agreement is made.

At this time, it is clear that the fifth question which I am now upon had been already settled and determined, as appears from a letter of the 14th April, 1891. This therefore is the *modus vivendi*.

Her Majesty's Government will prohibit until May next seal killing in that part of Behring Sea lying eastward of the line of demarcation.

and so on.

The United States Government in the same part of Behring Sea will prohibit seal killing for the same period.

Then:

Every vessel or person offending against this prohibition in the said waters of Behring Sea——

and so forth.

And now comes, at page 353, a letter of the 24th February 1892, from Mr. Blaine to Sir Julian Pauncefote.

We have now passed the time of the agreement to the Treaty.

I am in receipt of your favour of the 19th. You therein inform me that Lord Salisbury cannot express any opinion on the subject of the *modus vivendi* until he knows what we desire to propose. I am glad to hear that Lord Salisbury contemplates *modus*.

This is the *Modus Vivendi* of 1892.

Then he goes on to say:

If Her Majesty's Government would make her efforts most effective, the sealing in the North Pacific Ocean should be prohibited, for there the slaughter of the mothers heavy with young is the greatest.

Then on the 7th March, Sir Julian Pauncefote again writes, which will be found at page 355:

Lord Salisbury's proposal of a 30 mile radius round the Pribilof Islands within which no sealing should be allowed, is a judicious temporary measure of precaution pending the establishment of permanent Regulations for the fishery as a whole. It is a somewhat larger proposal than that which you originally made to me on the 16th March 1891, and which was for a similar radius of 25 miles only.

Then comes the most important of these letters from Mr. Wharton to Sir Julian Pauncefote, of the 8th March, 1892, which is at page 356.

The United States claims an exclusive right to take seals in a portion of Behring Sea, while Her Majesty's Government claims a common right to pursue and take the seals in those waters outside a three-mile limit. This serious and protracted controversy, it has now been happily agreed, shall be submitted to the determination of a Tribunal of Arbitration, and the Treaty only awaits the action of the American Senate.

We have, therefore, got to the point not merely of the Treaty
944 of Arbitration, but we have at this time reached the second *Modus Vivendi*, and here we have Mr. Wharton's distinct intimation of what is at that point (and Mr. Wharton was quite right, because it was the case that was made in the previous diplomatic correspondence), the case made as to the justification of the seizure.

The United States claims an exclusive right to take seals in a portion of Behring Sea, while Her Majesty's Government claims a common right to pursue and take the seals in those waters outside a three-mile limit.

That is exactly what I say is the issue intended to be raised by this fifth question.

I think there is one other passage that perhaps I ought to read:

The President cannot agree, now that the terms of Arbitration have been settled, that the restrictions imposed shall be less than those which both Governments deemed to be appropriate when it was still uncertain whether an early adjustment of the controversy was attainable. He, therefore, hopes that Her Majesty's Government will consent to renew the arrangement of last year with the promptness which the exigency demands, and to agree to enforce it by refusing all clearances to sealing vessels for the prohibited waters, and by re-calling from those waters all such vessels as have already cleared. This Government will honourably abide the Judgment of the High Tribunal which has been agreed upon, whether that Judgment be favourable or unfavourable, and will not seek to avoid a just responsibility for any of its acts which, by that Judgment, are found to be unlawful. But certainly the United States cannot be expected to suspend the defence, by such means as are within its power, of the property and jurisdictional rights claimed by it pending the Arbitration and to consent to receive them from that Tribunal, if awarded, shorn of much of their value by the acts of irresponsible persons.

Senator MORGAN.—Will you allow me to suggest to you this enquiry? The *Modus Vivendi* of 1891, as I understand, is not included in the Treaty of February the 29th 1892; but the *Modus Vivendi* of 1892 is included in that Treaty?

Sir CHARLES RUSSELL.—Quite so.

Senator MORGAN.—The *Modus Vivendi* of 1891 is entirely left out of consideration in the Treaty of February the 29th 1892?

Sir CHARLES RUSSELL.—That is so, Sir.

Senator MORGAN.—Now, the proposition you have just read is that the United States claims an exclusive right to take seals in a portion of Behring Sea, while Her Majesty's Government claims a common right to pursue and take the seals outside of the 3 mile limit. I wish to call

attention to this as a question, and only as a question, whether that exact subject is not provided for in Article I, instead of in the 5th point in Article VI.

Sir CHARLES RUSSELL.—No; with great deference, I think not, because question I, as you yourself very early in the discussion pointed out, is entirely conversant with what exclusive jurisdiction and what exclusive rights Russia asserted and exercised.

Senator MORGAN.—I spoke of article I of the Treaty.

Sir CHARLES RUSSELL.—Oh, I beg your pardon.

945 Senator MORGAN.—I think when they came to formulate the Treaty, and drew up the final agreement, the question you have been considering and reading an extract from was included in the first question submitted in Article I of the Treaty.

Sir CHARLES RUSSELL.—I was about to refer to that Article, strangely enough, in an entirely different sense, to show that that supports, as I submit, the contention I am upon.

Senator MORGAN.—It may do so.

Sir CHARLES RUSSELL.—The thread of that contention on the part of the United States runs all through the assertion of exclusive jurisdiction in a defined area, and I submit it is borne out by the language of Article I.

The questions which have arisen between the Government of Her Britannic Majesty and the Government of the United States concerning—

what?

the jurisdictional rights of the United States in the waters of the Behring Sea and concerning also the preservation of the fur-seal.

Jurisdictional rights to be determined as a matter of right: the preservation of the fur-seal to be determined as a matter of regulations.

Senator MORGAN.—The questions submitted seem to be presented in Article I, while the five suggestions or enquiries in Article VI are called points—five points which very properly may be included within the questions for consideration. The question submitted to the Arbitration seems to me to be worthy of consideration, whether the questions are not the ones to which the Award must respond.

Sir CHARLES RUSSELL.—I should have thought, with deference, that the questions are formulated, and if there be anything outside these questions mentioned in Articles VI and VII which the Tribunal should think ought to be answered, of course they are to be answered; but I take Articles VI and VII as intended, whether they have been effective or not is another question, to formulate for the assistance of the Tribunal the precise questions which would settle the controversy between the parties. The way in which the matter is put is this:

In deciding the matters submitted to the Arbitrators it is agreed that the following five points shall be submitted to them, in order that their award shall embrace a distinct decision upon each of the said five points, to wit

and then Article VII very properly treats those as questions.

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such a position that the concurrence of Great Britain is necessary

then there are to be Regulations.

Senator MORGAN.—That brings us up to the point whether or not the word "questions" in article VII does not refer to the three ques-
946 tions which are propounded in the first Article of the submission, and not to the five points mentioned in Article VI.

Sir CHARLES RUSSELL.—I should with great deference have said, when Article VII began with the words "If the determination of the foregoing questions", which you will observe are all put with a note of interrogation at the end of them, that Article VII pointedly, clearly, and distinctly referred to the foregoing five questions, and I think I am right in saying, subject to correction on that point, that there was not any difference in the argument of my learned friend and that which I now submit.

Senator MORGAN.—I am aware of that fact, but, of course, we have our own views.

Sir CHARLES RUSSELL.—Naturally, and I do not suggest the contrary. Now I think I have only to refer to two other letters. On the 22nd March there is a letter from Mr. Wharton to Sir Julian Pauncefote at page 361:

For it must not be forgotten that if Her Majesty's Government proceeds during this sealing season upon the basis of its contention as to the right of the Canadian sealers, no choice is left to this Government but to proceed on the basis of its confident contention that pelagic sealing in the Behring Sea is an infraction of its jurisdiction and property rights.

Finally, on page 363, Sir Julian Pauncefote writes to Mr. Wharton thus:

As an alternate course, Her Majesty's Government are also willing, after the ratification of the Treaty, to prohibit sealing in the disputed waters, if vessels be excepted from the prohibition which produce a certificate that they have given security for such damages as the Arbitrators may assess in case of a decision adverse

and so on.

Then there is a letter on page 364:

With reference to my previous note of this date, and to the discussions which have taken place regarding the claims of our respective Governments to compensation in relation to the fur-seal fishery in Behring Sea, I have been instructed by the Marquis of Salisbury,

and so on. Then he says this:

That in case the Arbitrators shall decide in favour of the British Government, that Government may ask them further to decide whether the United States Government has since 1885 taken any action in Behring Sea directly inflicting a wrongful loss on the United States or its lessees, and if so, to assess the damage incurred thereby.

Senator MORGAN.—But that feature did not get into the Treaty.

Sir CHARLES RUSSELL.—That is the feature which did get into Article V of the *Modus Vivendi*, which is a part of this Treaty.

Senator MORGAN.—Yes.

Sir CHARLES RUSSELL.—Then there is one passage which I wish to emphasize before I go on, in the letter of the 4th of June, 1891; it is at the foot of page 306:

The fourth clause of the proposal of Her Majesty's Government, limiting the
947 taking effect of the *modus vivendi* upon the assent of Russia, presents what seems to the President an insuperable difficulty, as an adherence to that suggestion by Her Majesty's Government will, in his opinion, prevent the conclusion of any Agreement and will inevitably cause such a delay.

and so on:

That I have already read. You observe that the object of Sir Julian Pauncefote was, by including Russia, to have the extension of the *Modus Vivendi* so as to prohibit the killing in other parts of the Behring Sea westward of the line of demarcation; and this is the way in which that suggestion is met by Mr. Wharton.

I am also directed to remind you that the contention between the United States and Great Britain has been limited to that part of Behring Sea eastward of the line

of demarcation described in our convention with Russia, to which reference has already been made, and that Russia has never asserted any rights in these waters affecting the subject-matter of this contention and cannot, therefore, be a necessary party to these negotiations if they are not now improperly expanded. Under the Statutes of the United States, the President is authorized to prohibit sealing in the Behring Sea within the limits described in our Convention with Russia, and to restrict the killing of seals on the Islands of the United States. But no authority is conferred upon him to prohibit or make penal the taking of seals in the Waters of Behring Sea westward of the line referred to, or upon any of the shores or islands thereof. It was never supposed by anyone representing the Government of the United States in this correspondence, or by the President, that an Agreement for a *modus vivendi* could be broader than the subject of contention stated in the correspondence of the respective Governments.

Now, Sir, I submit that I have said enough to show that I am raising a grave question for the consideration of this Tribunal, as to the true construction of that question 5: whether, in other words, I am not justified in stating that that question, like the first four, is conversant with questions of jurisdiction and exclusive right in a limited area, namely, the eastern part of Behring Sea; and that in no part of the correspondence leading up to the Treaty, nor in the Treaty itself, is there raised the question of a right of property in the individual fur-seal, or in the herd, or in the industry based upon the fur-seal, except as a question of jurisdiction within this limited area. I, of course, have already told the Tribunal that I cannot venture to assume that the meaning which I am putting upon this question is the meaning which the Tribunal will say is right, and, therefore, it would be incumbent upon me to argue it presently as if it had a different meaning, such as my learned friend suggests. That I will not shrink from doing, but I feel bound to put before the Tribunal our view, justified as I contend by the legislative and executive action of the United States, and by the diplomatic correspondence: that from first to last this was a question, in whatever shape it was put, which was based upon jurisdiction of an exclusive, in other words of a territorial character, and it is properly in that character referred to, in Article VII, as being a question of exclusive jurisdiction.

Now I must assume at this present stage of my argument that
948 the question is, has the United States an exclusive right to take fur-seals in the eastern part of Behring Sea, and an exclusive jurisdiction to enforce and protect by the exercise of sovereign power that right in the eastern part of Behring Sea?

The PRESIDENT.—Do you believe that the words in Article VII

The fur-seals in or habitually resorting to the Behring Sea

were originally conceived as making part of the first wording of that Article VII, or were they brought in afterwards? Do you know anything about that?

Sir CHARLES RUSSELL.—I can answer that question, Sir, because the original frame of the question is to be found in Mr. Blaine's letter of December 1890. I have read that letter to you and I will read it again. It is in page 286 of the United States Appendix Volume 1. Of course I have read the correspondence which brought it down to a later period, showing the views of Mr. Wharton after the Treaty was actually executed and signed. The words are there in the original letter of Mr. Blaine; and if you turn to page 295, you will see that Mr. Blaine repeats the substance of the same question in that letter of the 14th April 1891; the 5th question is stated in the form in which it is there suggested.

Mr. Justice HARLAN.—What Baron de Courcel is referring to now is, what is the 7th Article, but which was originally the 6th question: and

that 6th question, in the form in which it appears in the Treaty first appears in Mr. Wharton's letter of June 25th 1891, page 319.

Sir CHARLES RUSSELL.—That is quite right.

Mr. Justice HARLAN.—That is where the words "habitually resorting to" come into the 6th question?

Sir CHARLES RUSSELL.—Yes, but with great deference they also appear, not as part of the 7th question, for there was no 7th question at that moment, but they also appear in the letter of Mr. Blaine of the 17th December that I have mentioned.

Lord HANNEN.—Is that their earliest appearance?

Sir CHARLES RUSSELL.—As far as I know.

Mr. Justice HARLAN.—What do you say appears there?

Sir CHARLES RUSSELL.—They do not appear in the letter of December 17th—I mean not exactly.

Mr. Justice HARLAN.—I have not been able to find them in the sixth question anywhere prior to June the 25th, 1891.

Sir CHARLES RUSSELL.—I think that is correct.

Mr. Justice HARLAN.—When Mr. Wharton reframes the sixth Question, he submits it in the precise words of Article VII.

Sir CHARLES RUSSELL.—I think you are right; I think that is so.

Senator MORGAN.—A different mind had got hold of the correspondence, and put in that additional idea.

949 Sir CHARLES RUSSELL.—I should like to emphasize this. If you will turn to page 305, you will see that, at that time, the five Questions had been settled; and Sir Julian Pauncefote writes.

The undersigned has been instructed by the Marquis of Salisbury to inform the United States Government that Her Majesty's Government are prepared to assent to the first five questions proposed to be submitted to arbitration in the note of the Hon. James G. Blaine to the undersigned, dated 14th of April last.

That letter is at page 295.

Her Majesty's Government cannot give their assent to the sixth question formulated in that note. In lieu thereof they propose the appointment of a commission to consist of four experts, and so on. "The Commission shall examine and report on the Question which follows":

For the purpose of preserving the fur-seal race in Behring Sea from extermination, what international arrangements, if any, are necessary between Great Britain and the United States and Russia or any other power?

As regards the question of compensation, Her Majesty's Government propose the following article.

It shall be competent to the Arbitrators to award such compensation,

and so on.

Therefore at that date, and long before the correspondence with Mr. Wharton which I have been reading, the first five questions had been settled, and I was using that correspondence for the light it throws upon the meaning which Mr. Wharton attached to those five questions. Then, after the 3rd or 4th June arises the question which is now the 7th Article, namely the question of Regulations. That is the way in which the matter stands.

The PRESIDENT.—Then you do not construe the protection spoken of in question 5 of Article VI in the same way as the protection mentioned in Article VII?

Sir CHARLES RUSSELL.—In one sense yes, and in another sense no. I would prefer, if the Arbitrators would allow me to do so, to reserve my construction of Article VII till I come to it. I think it would be better that I should do so. I have a strong view about it, if the President will allow me to say so, but I do not want to mix up the question of right and the question of Regulations.

Senator MORGAN.—It occurs to me, perhaps I am entirely mistaken, that the decision, whichever way it may turn, on the five questions in Article VI—still omits a decision upon this question of the rights of the citizens and subjects of either country as regards the taking of fur-seals in or habitually resorting to the said waters. Of course, that question would be negatively answered in the affirmative proposition that the seals belonged to the United States, or that the United States had a right of protection over the seals; but, at the same time, this affirmative question is put to the Arbitrators; and we are instructed here that we shall decide every question that is submitted to us, and it seems to me that we must give an affirmative answer on that proposition. I mean, by an affirmative answer, a direct answer.

Sir CHARLES RUSSELL.—I think you do. I should have
950 respectfully submitted, as far as I can at present see, that the answers to the first five questions answer everything. For instance, assume the first four questions to be decided in the sense that Russia exercised and asserted these rights and that Great Britain recognized and conceded them, and that to those rights the United States succeeded by right of cession, then the answer in that sense would be the negation of the right of anybody else, because you would have then found that there was an exclusive right and an exclusive jurisdiction, and that would be a distinct answer. Equally the other way; if the answer is there was no exclusive right and no exclusive jurisdiction, then it follows that it is left to be determined according to general international law; in other words, it is a matter of common right. Article I is a mere general statement of the nature of the questions that have arisen. Article VI deals with the specific points which are to determine those questions.

Senator MORGAN.—But Article I says: "These questions shall be submitted to a Tribunal of Arbitration".

Sir CHARLES RUSSELL.—Yes; that is to say, the matters that have arisen.

Senator MORGAN.—No; "these questions."

Sir CHARLES RUSSELL.—I know, Sir; but that is a description merely of the matters of difference that have arisen. That is my conception.

Now if I am right in this interpretation—and I have said all I desire to say upon it—I may deal with the argument upon it very briefly indeed. I have, in fact, already dealt with it in the argument as to Russian assertion of rights and Russian exercise of rights, because although it is true to say that question I of Article VI does not ask what rights Russia in fact had, but only what rights she asserted and exercised, it is not too much to say that if she had any other rights than those she did assert and exercise, she would have asserted them and exercised them if it had been necessary for her purpose to assert and exercise them.

We have come therefore to this point: That if my interpretation is right—and of course I am arguing upon that assumption at present—it must be held that the United States can assert that it has rights which Russia had not. In effect it comes to that. I have already discussed what rights Russia had. Russia was the possessor of dominion on the Pribilof Islands. She was therefore the owner of the islands to which these animals resorted for a considerable portion of the year. She therefore had special facilities for capturing, taking possession of, and killing these animals. She had that exclusive right by reason of her territorial dominion. She had the extension of that exclusive right to the three mile limit, or whatever the marginal belt is to be considered.

She had no right beyond, unless there is to be asserted on the part of Russia, or on the part of United States, some power over the adjoining sea of an exclusive kind, which is not found to be recognized by international law. There may be such a right if there is property in the fur-seal. That I shall discuss when the question comes up. There
951 may be such a right if there is property in the seal herd. That I shall discuss when I come to the question in its proper order. I am assuming that the question relates not to property in the seal, and not to property in the herd, but to what the rights are; and the circumscription of the rights which, as territorial owner, any nation possesses is, according to authority, exactly as I have stated it.

Now, what is the foundation of this argument? The ultimate foundation of it is this—that no question of exclusive jurisdiction in a defined area can exist apart from territorial dominion, from sovereign power, over that area; because the assertion of exclusive jurisdiction is an assertion that nobody else has a right to go there; is an assertion of the right to exclude everybody else from that place; is an assertion of the right to treat the particular area covered by so much water just on the same principle as if it were so much land, and a part of the admitted *terra firma* of the particular Power that is claiming to exercise it. What does that amount to when it is extended to a claim on the high seas? It conflicts with, is repugnant to, two great principles: first, the principle of limitation of territory to a specific distance from the shore, *terræ dominium finitur ubi finitur armorum vis.* It is next repugnant to the great principle of the equality of every nation, small and great, upon the high sea outside the three mile limit, or whatever the marginal belt is. It is therefore an assertion conflicting with the sovereignty of any and all other Powers, who are equal and have equal rights upon the high sea.

Exclusive jurisdiction in a defined area cannot exist apart from territorial dominion.

Am I to be invited by the Tribunal to justify that position, apart from the right of defence incident to property, which I am not dealing with? I am assuming the question to mean what I have endeavoured to demonstrate it means. Is it necessary that I should argue that upon the basis there is no such right? Why, it is hardly put forward in the argument of my learned friend. What is put forward by my learned friends is to be found on page 19 of their Counter Case.

The distinction, between the right of exclusive jurisdiction over Behring Sea on the one hand, and the right of a nation on the other hand, to preserve for the use of its citizens its interests on land by the adoption of all necessary, even though they be somewhat unusual, measures, whether on land or sea, is so broad—

Yes, indeed!

as to require no further exposition.

And so they are content to leave this proposition. If that means preserve for the use of its citizens its interests on land by adopting measures at sea to protect its property or its property interest, which I suppose is what is meant, I will deal with it presently; but what I am dealing with now is the first part of the case, that this claim, this question five, points to the right of the exclusive territorial jurisdiction over the eastern part of the Behring Sea; and if that be the right meaning of the question, my learned friends admit it is the
952 latter right, not the former, that the United States contend to have been exercised, first by Russia, and later by themselves.

The PRESIDENT.—Sir Charles, if you construe the question five as meaning only rights of jurisdiction, do you not think then that question five would be just a repetition of question four?

Sir CHARLES RUSSELL.—In one sense yes, and in another sense no.

The PRESIDENT.—I say if under question five in Article VI we are to understand nothing but rights of jurisdiction—

Has the United States any right, etc. . .

that would be just exactly the same as question four.

Did not all the rights of Russia as to jurisdiction pass unimpaired to the United States?

Sir CHARLES RUSSELL.—I quite agree, Sir; practically, yes. That is what I am arguing. I have argued this question five, and my meaning is the same when I have been discussing the first four questions, except with this difference: that articles one, two, three and four deal solely with derivative rights from Russia, and in article five the question is, what rights has the United States as a matter inherent in its own possession of territory.

The PRESIDENT.—The authors of the Treaty must have anticipated something different from what was in the preceding questions.

Sir CHARLES RUSSELL.—It does not necessarily mean that it should be something different. It contemplates the possibility of its being something different; but it merely contemplates the possibility in this sense: "We assert that Russia asserted certain exclusive claims of jurisdiction; we also assert that we have certain exclusive claims of jurisdiction".

In each case, if my contention is right, it is limited to a claim of territorial dominion.

The PRESIDENT.—I believe, as we understand the case of the United States, they understood that this question five meant also derivative rights. They did not argue that they had new rights which originated in the cession of territory in their hands only, but that the same rights were vested in Russia.

Sir CHARLES RUSSELL.—That is what I venture to say; and that is the reason I said that in arguing what rights Russia asserted and exercised, I was also really arguing question five. You see the distinction is that questions one, two, three and four, were directed to what rights were asserted and exercised. Question five may have a more restricted or a more enlarged meaning—what rights in fact the United States have. But I was about to say that I could deal with this matter very briefly because I have shown, if my interpretation of the question is right, that that is not the nature of the right which the United States are claiming for themselves; because I take it that although this is a statement that the latter right, and not the
953 former, is the right which the United States contend was exercised first by Russia and later by themselves, that they embrace not only their own derivative claim under Russia, but their own claim, whatever it is, as inherent in their territorial possessions.

The PRESIDENT.—Their argument is that they have peculiar rights. Your argument is that this question five merely limits the right of jurisdiction, like the preceding questions?

Sir CHARLES RUSSELL.—Unquestionably, sir, although it is conceivable that there may have been a right which the United States possessed that Russia neither asserted nor exercised. It is conceivable. That is all.

The PRESIDENT.—You think it is upon that hypothesis that the question has been brought in?

Sir CHARLES RUSSELL.—I can only judge by the terms of the question itself. I take the language in which Mr. Wharton, the Acting

Secretary of State, construes it. I take the language in which the diplomatic correspondence construes it.

I was going to say I propose to deal briefly with this because of the views which have been put. The point where my friends and I differ—materially differ, I mean—here, is as to what the meaning of this question is. I have already told the Tribunal I am not going to assume my meaning is the correct one. I propose to argue it also on the basis that their meaning is the correct one. That I will presently come to; but I must take it step by step.

The PRESIDENT.—Do you mean to argue it at some length?

Sir CHARLES RUSSELL.—I have four or five authorities; but they are authorities upon points which I conceive not to be disputed.

The Tribunal thereupon adjourned until Tuesday, May 22, 1893, at 11:30 o'clock a. m.

TWENTY-FIFTH DAY, MAY 23RD, 1893.

The PRESIDENT.—We are happy to resume our hearing again, Sir Charles, and are quite ready to hear you.

Sir CHARLES RUSSELL.—Mr. President, when the Tribunal last sat, I was discussing what was the true meaning of question 5 of Article VI. I had pointed out what we conceive to be the meaning, and I had added that I proposed also to discuss the different effect given to that question in various forms in the Argument on the part of the United States. While I was endeavouring to establish the point that question 5 is of the same character as the preceding questions, in the sense that it relates to a question of exclusive jurisdiction, and is so designated in the succeeding Article VII,—while I was dwelling upon that point, you, Mr. President, put to me the question whether the result of the argument would not be in effect to say that question 5 was the same as question 4: to which I answered, and I repeat that answer: in effect, yes. But I have now to suggest the probable reason why question 5 was added.

It will be observed by the Tribunal that all the previous questions, 1, 2, 3, and 4, are conversant with rights which Russia asserted and exercised. It has, therefore, nothing to do with what rights Russia possessed.

Therefore question 5 might properly find a place in the Article in order to cover the possibility (it was no more than a possibility) that there were rights which Russia had in fact, but which she did not assert or which she did not exercise. That would I think be a sufficient explanation by itself why question 5, although of the same character as the preceding questions, still finds a place in that Article. A further explanation might be found in this fact, that at the period to which the first four questions relate, namely, the period of Russian dominion, the whole of the territory on the east side of Behring Sea down to and including the Aleutian chain, and the whole of the territory upon the west side of Behring Sea from Behring Straits down to the southern side of Kamschatka, were also Russian territory. Therefore question 5 may also have been framed in order to leave open the point whether any rights over the intervening waters that Russia may have asserted and exercised, treating it if she so willed, and as she professed to have the power to do, as a shut sea—whether that condition of things was or was not altered when the portion of the territory bounding the eastern side of Behring Sea passed into other hands so that the territory on each side came to be in different ownerships.

But so far as the mere questions in Article VI are concerned—
955 I say it with all respect to my learned friends—I care not what meaning is put upon them so far as those five questions are concerned.

I shall have to submit that just in proportion as they depart from the main argument of Mr. Blaine based upon the assertion of territorial dominion derived from Russia, just so in proportion do they become more and more involved in absurdities, more and more indefensible in law become the positions they assume. I only attach importance to it

and would not have dwelt even at this length upon it but that it has strictly a more wide-reaching significance; because I have utterly failed in my argument if I have not conveyed to each member of this Tribunal the contention which we are submitting, that in truth the whole area of dispute between these parties was Behring Sea, and nothing outside Behring Sea: and that if the area of dispute was Behring Sea, and nothing but Behring Sea, the area of jurisdiction of this Tribunal is restricted within the same limits.

But I repeat, and I leave that part of the argument by saying that I think the Tribunal will find the more they examine the history of the United States contention, their executive action, their proceedings in their local Courts, the arguments of their representative counsel at Washington—the Solicitor and Attorney General—the diplomatic correspondence, Article VII of this Treaty, and lastly Article V of the *Modus Vivendi*, which recognizes and limits the right to compensation to be paid by us if we have no right to kill seals merely in the Behring sea—that, taking all these things into consideration, the Tribunal, whatever may be its desire, will find it exceedingly difficult to satisfy themselves that the area of dispute is not limited by the terms of this Treaty strictly to Behring Sea.

I have now to say in connection with this, and to repeat what I have already said, that if my suggested interpretation of these questions be correct, namely, that it meant an exclusive right to take fur-seals in Behring Sea, that is to say, a property right of an exclusive character in the fishery in Behring Sea and not in the seals as individuals or in the herd, and that the claim of protection referred to meant a claim of exclusive jurisdiction to protect them within the eastern part of Behring Sea,—that if that be the true meaning, I am saved the discussion of it, because I have already discussed it, and discussed it at length, under the question of the derivative title claimed under Russia. I hope that is appreciated by the Tribunal, and I do not desire to repeat myself, nor do I at this stage propose to trouble the Tribunal with the citation of the authorities which show that a claim within a definite area and a claim by which it is sought to exclude other ships of other nations from that definite area of the sea, is a question of the sovereignty: that nothing can justify it according to the rules of international law short of an assertion founded upon the just reasons of prescription and acquiescence, upon which alone can be based claim of territorial dominion pure and simple.

Now, I assume, and I confess it would be quite natural that the Tribunal should be anxious to assume, as wide a meaning to this 5th
956 question as it is capable of; for I agree it is much more important to determine what rights the United States has rather than what is the meaning of this particular question, although the Tribunal, of course, will see that, in order to answer that question correctly, the attempt must be first made to fix what the true meaning of the question is. I have suggested one.

Now, I will assume that it means the assertion of a right of property in one of three different forms: in the seals, or in the herd as it has been called, or in the industry founded upon the seals; and, correlative to that right of property, the further right of protecting it by search, seizure and confiscation; and I proceed, therefore, to enquire whether there is, in any one of those alleged forms, any legal right of property whatever in the United States.

I am glad to find myself in agreement on some points with my learned friends; I agree that the question of property in the seals or in the

Assertion of property in the "herd" examined.

seals as a collection, or group, or herd, depends upon the nature and habits of the animal and the physical relations of the United States to that animal. For my own part I am entirely unable to draw any distinction between the claim of property in the seals and the claim of property in the so-called seal herd. I cannot see where there is any legal ground for any such distinction. If there is property in the individual seals, there is property in the herd composed of those individual seals. If there is no property in the individual seals, it passes human comprehension, at least my comprehension, how it can be alleged that there is a property in the herd or collection of individual seals. Because it cannot be that a congregation of items each one of which is, upon the hypothesis, not property, yet, when they make up the whole, which is called a herd, become property. The question, therefore, really is; Is there a property in the individual seals? Because I am not going to argue (it would be absurd, in my judgment, to argue), that if there is a property in the individual seals, there is not a property in the herd which is made up of a number of individual seals. I will speak of the industry presently. Upon this part of the case the question is:—Has the United States property in the individual seals?

Now, I would like the Tribunal to note the signs of distrust with which this argument is advanced upon the part of the United States. I propose to cull some brief passages from the written Argument of my learned friends. At page 104 this passage occurs:

> It may be asked whether the claim made by the United States goes to the extent of asserting a legal right of property in *any individual seal* which may at any time be found in the seas between the Pribilof Islands at the north and the coast of California at the south. And whether they would insist that in the case of any seal captured anywhere within those limits by any person other than a native Indian, and for purposes of scientific curiosity, or to satisfy hunger, a trespass had been committed upon the property of the United States, and an action might be maintained in their name in a municipal tribunal to recover damages, or for the recovery of the skin of the animal, if it should anywhere be found. The United States do not insist upon this extreme point, because it is not necessary to insist upon it. All that is needed for their purposes is that their *property interest* in the *herds* should be
> 957 so far recognized as to justify a prohibition by them of any *destructive pursuit* of the animal calculated to injure the industry prosecuted by them on the islands upon the basis of their property interest. The conception of a *property interest in the herd*, as distinct from a particular title to every seal composing the herd, is clear and intelligible; and a recognition of this would enable the United States to adopt any reasonable measures for the protection of such interest.

Well, Mr. President, it may be my fault—the Tribunal must say—but I confess so far from the conception of a property interest in the herd being clear and intelligible as distinct from a particular title to the individuals composing the herd, I utterly and absolutely fail to appreciate it—The sole point is property or no property. How in the name of heavens, if there be no property in the individual seal, the collection of a number of items, each of which is not property, yet go to make up property in the whole, I cannot realize; and it is a matter greatly I think to be regretted that either in the written argument, or in the oral argument, more effort was not made to convey this so-called clear intelligible conception to minds like those of my learned friends and like mine, which have certainly entirely failed to grasp it.

Now another passage in the same sense is found in page 133 in the same argument.

> While the United States Government asserts and stands upon the full claim of property in the seals which we have attempted to establish, it is still to be borne in mind that a more qualified right would yet be sufficient for the actual requirements of the present case. The question here is not what is the right of ownership in an

lual seal, should it wander in some other period into some other and far dis-
a; that is an inquiry not essential to be gone into; but what is the right of
ty in the herd as a whole,

the whole is made up of parts; and if there is no property in the
how is there property in the whole?—

he seas and under the circumstances in which it is thus availed of by the
l States Government as the foundation of an important national concern.

w, lastly (and I cannot deny myself the pleasure of referring to
when my friend Mr. Carter got to this very ticklish point, some of
embers of the Tribunal interposed questions. I am referring to
475 of the revised text of my friend Mr. Carter argument.

. CARTER.—One moment, Sir Charles—there are not that number
ges in the argument as revised by me. I do not know what you
eferring to as the "revised text."

CHARLES RUSSELL.—I am referring to the report which we have
furnishing to the Tribunal.

. CARTER.—I shall insist that the only report that can be referred
the one revised by me.

CHARLES RUSSELL.—That would indeed be very strange.

e PRESIDENT.—If there is any objection to what Sir Charles Rus-
eads, you will be able to state your objection.

Mr. CARTER.—Yes, but I object to the practice of referring to it.

Sir CHARLES RUSSELL.—That would be very extraordinary.
I have not even read my friend's argument in any other form
the form with which I have been familiar.

e PRESIDENT.—Both reports are unofficial.

. CARTER.—Yes, but of two unofficial reports I submit that the
hich the Tribunal should use in a matter of reference should be
ne prepared by counsel.

e PRESIDENT.—If there is any doubt about it, of course, you will
to your text.

CHARLES RUSSELL.—I think my friend will see that he has no
n to complain.

. CARTER.—I object to the practice, that is all.

CHARLES RUSSELL.—Then I insist on my right, Mr. Carter, if
ut it so.

. CARTER.—And I object to it.

CHARLES RUSSELL.—I was going to say that, my friend will
no reason to complain, because if there be anything that he wishes
avow in what is here recorded, I will accept his disavowal at once.

. CARTER.—Yes, but there is an authorized report of the argu-

d HANNEN.—There is no such thing as an authorized report of the
nent.

CHARLES RUSSELL.—With great deference, I cannot accept the
nent of my learned friend. The authorized argument was the oral
nent. We for our convenience, and at our own sole cost, have
shed the Tribunal all through with an authentic report, carefully
ed as far as the intelligence of those to whom that task was
ed enabled them to do it—fairly and properly revised.

d HANNEN.—You will tell us what you believe Mr. Carter said,
f any dispute arises upon it, of course we shall be very happy to
what Mr. Carter has to say about it.

CHARLES RUSSELL.—I may at some future time, although I will
romise, have the pleasure of reading my friend's revised edition
s argument, but at present I have not seen it or even looked at it.

Now the page of the daily report to which I am referring is page 47 and my learned friend is dealing with that very thorny subject—tl early history of pelagic sealing. He is face to face with the fact, whi he admits, that the first and earliest pursuit of fur-seals known in tl history of the human race was pelagic fur-sealing, carried on no doul in a rude fashion—not in as effective a fashion as modern applianc permit, but still carried on as a means of subsistence, and as a mea of affording articles for barter (and in that way furnishing them 1 commerce), along the coast at the instance of the aboriginal native My learned friend, addressing himself to that subject, said:

As I said before, many times in the course of my argument, the attack by barb rians on the fruits of the earth is limited, confined, and generally not destructive but when civilization makes her attack upon them her methods are perfectl
959 destructive, unless she makes use of those appliances which civilizatio teaches her by which that destruction may be avoided. Therefore there is n difficulty in awarding to the United States a right of property, subject to the righ of the Indians to capture in the manner in which they were formerly accustomed t do before the use of vessels for pelagic sealing; but not a right to go out and engag in pelagic sealing.

The PRESIDENT.—Do you not think it very difficult to draw a legal line of limitation between what an Indian is allowed to do for himself, and what he may b allowed or permitted to do in the service of a European or civilized man?

Mr. CARTER.—There are always practical difficulties connected with dealings wit barbaric tribes—greater or lesser difficulties—but not insuperable difficulties con nected with it.

My friend evades the point,—does not even appreciate the point. I is not a question of there being greater or less difficulties in dealin with barbaric tribes—it is the question whether it is not difficult t draw the legal limitation between what is admitted to be a thing tha the Indian may do for himself, according to his barbaric methods, an what he may do if employed at the instance of civilized man. Th learned President recalls my friend to the question with this obse vation:

Do you find that there is a substantial legal difference between the two cases?

Mr. CARTER.—There is a substantial one.

The PRESIDENT.—Between the case of an Indian fishing on his own account, an an Indian fishing on the account of a civilized man?

Mr. CARTER.—I think there is a very substantial one.

The PRESIDENT.—A substantial legal one?

Then we get to that broad ground which is always the refuge onc we are trying to bring these vague, undeterminate propositions to th touch of legal principle.

Yes,

says Mr. Carter,

when I speak of "legal" I mean moral. We are on international grounds—inte national law, and there is a sharp distinction.

The PRESIDENT.—Moral and international are different fields of discussion, think.

Mr. CARTER.—I said "there is *no* sharp distinction".

Sir CHARLES RUSSELL.—Very well—"there is no sharp distinction I take it so. That is to say, being in the field of international lav there is no sharp distinction between moral and legal law—that is th proposition, therefore, of my friend.

Mr. CARTER.—It is.

Sir CHARLES RUSSELL.—Yes, I know. Then the learned Presiden continues:

Moral and international are different fields of discussion, I think; but they ma often join.

Mr. CARTER.—They are not so different as may be supposed.

The PRESIDENT.—They are not contrary.

Mr. CARTER.—Oh no, international law rests upon natural law, and natural law is all moral.

The law of nature is all moral, and it is the great part of international law.

960 Here we get back to that same fallacy which I have endeavoured to expose in a few sentences, and to which I must recur at a later period a little more fully—that fallacy which lies at the basis of these proposals—that if you can make out to your private satisfaction that a thing is against morals, or against the law of nature (whatever the law of nature means in the connection in which it is used) it is therefore against international law: it is therefore to be reprehended. With great deference to this Tribunal the distinction is justly, accurately, and truly drawn, in that observation of the learned President in which he said, "Moral and international law are two fields of discussion, but they may often join", which is to affirm in another way the proposition to which I invited, without any fear of the result, the assent of this Tribunal, namely that while moral law enters largely into the conception of international law—largely tends to the formation of international law—yet only so much of moral law as international law has taken up into and embodied in itself can be referred to in a discussion of lawyers and of judges as forming international law at all. But I do not end this discussion here. My friend Mr. Carter, then proceeds, it having been pointed out to him by Lord Hannen that the mode of hunting pursued by the natives was not confined merely to their sustenance, but that they were the suppliers, in the first instance, of the skins of these wild animals—fur-seals and others included.

Mr. Carter quite candidly says:

That is true. They were the original traders, and they were made use of by the purposes of commerce, but what I mean to say is, that was *commerce*.

Lord HANNEN.—Yes, carried on by the natives.

Mr. CARTER.—I know, but that was commerce. They were supplying the commerce of the world. They were not supplying themselves with clothing—they were not furnishing themselves with seals for food.

The PRESIDENT.—That you would consider was legal at the time, but would not be legal now.

Mr. CARTER.—Before the Russians discovered these regions they were inhabited by Indians, and these Indians did pursue seals in that way. It is a pursuit without method—without making any effort to preserve the stock; destructive, of course, in its character, but not of sufficient extent to endanger the existence of the race of the animal.

Then on the next page, page 477, my friend said:

The distinction which I mean to draw is a distinction of a resort to the seals for the purpose of the personal use of the people, such as they were in the habit of making before they were discovered by civilized men—the distinction between that pursuit and that which is promoted by civilized men for the purpose of supplying the world with these skins. That is the distinction. The first pursuit which is confined to the barbarians is not destructive of the stock. Nor is the other, as long as it is limited to certain very narrow proportions and conditions.

Well, the whole legal proposition is given away in this discussion. Then my friend continues:

But when it is increased then it does threaten the stock. What must you do then? You must adopt those measures which are necessary to preserve the
961 stock; and what are the measures which society always employs for that purpose? I have detailed that already—it is to award the institution of property.

Now, did ever an able man present so inconsequential an argument as that to a Tribunal of intelligent judges? It is said: "The Indians had a right to pelagic sealing: They had a right to it, and they carried it on even for the purposes of commerce: Civilized men carried it on,

but carried it on only to a small extent, and they had a right to car it on to a small extent so long as it did not affect the stock: But wh it begins to affect the stock then rights change—that which was a rig the day before ceases to be a right the day after that event begins happen"; and this Tribunal is asked to do what?—Not to declare wh the property rights had been and were, but is (to use the language my friend), *to award the institution of property.* I say that it is n the function of this Tribunal—it is a misconception of the function this Tribunal to address any such argument to it.

Mr. CARTER.—I observe you did not read the whole.

Sir CHARLES RUSSELL.—I did not, indeed; there are a great ma hundred pages of it. If there is any further passage you desire to read, I will read it with pleasure.

Mr. CARTER.—I said you did not read the whole of what you we upon.

Sir CHARLES RUSSELL.—The whole of that sentence? It is this:

It is, to award the institution of property. Now, must society withhold effort,—must it forbear to employ those bounties—

Mr. CARTER.—"Agencies" would be a better word.

Sir CHARLES RUSSELL.—Very well.

because here are a few hundreds of Indians in existence who may have some righ in reference to them? No, they are not to be considered, surely. We can not allo this herd of seals to be extinguished just for the purpose of accommodating a fe hundred Indians upon that coast,—surely not.

Then, if I go on, I shall have to go on for some distance. Is the anything more you want me to read?

Mr. CARTER.—I do not wish you to read anything; but when yo do undertake to do it, I would read the whole of it if I were you.

Sir CHARLES RUSSELL.—I will read to the end of the page, becau I think the subject there ceases.

The PRESIDENT.—It may be that the civilized fishermen may not be more than few hundred also. The number of men employed is not absolutely a foundation legal discrimination,—a legal duty.

Mr. CARTER.—You mean those employed on the Pribilof Islands may be a fe hundreds?

That was really not the point of the question.

The PRESIDENT.—I mean, the pelagic sealing may be carried on by a few hundr Indians, but that is no matter. The difference that you make is whether they a Indians or civilized.

962 Mr. CARTER.—Yes.

The PRESIDENT.—Suppose Indians make commerce, selling or barteri their skins,—you allow that also?

Mr. CARTER.—Where it is not destructive.

The PRESIDENT.—It is a question of proportion,—of measure with you.

Mr. CARTER.—If it is destructive, then it is not to be allowed. They have right to destroy the race of animals.

The PRESIDENT.—In order to give you satisfaction, the question would be to kn within what limits pelagic sealing may be carried on without being destructive.

Mr. CARTER.—Yes, that is practically the question. If you say pelagic seali can be carried on without being destructive.

The PRESIDENT.—By Indians, at any rate?

Mr. CARTER.—By Indians in their canoes in the way in which it was origina carried on. That does not threaten the existence of the herd.

The PRESIDENT.—That is a natural limitation.

Mr. CARTER.—But it is possible to do this. It would be possible for those w are now engaged in pelagic sealing: for instance, to say: "The Indians are p mitted to carry on pelagic sealing; we are prevented from doing it. We will ju employ those Indians".

The PRESIDENT.—That is the difficult point which I just hinted at.

Now, I think I have read as much as will make clear the view that is there put.

Again my learned friend in another part of his argument said: "We affirm that the property in these seals is as clearly the property of the United States as a ship belonging to the United States." Well, it does not do to carry these illustrations too far; but really this does suggest itself to one's mind. My learned friend says a seal is as much property as a ship. Let us suppose a fleet of ships. It would be a very curious result that a fleet of ships was the property of the United States, but that the individual ships were not the property of the United States, if the parallel of the property in the seal and in the ship is so complete as my friend would seem to suggest.

EXAMINATION OF THE NATURE AND HABITS OF THE FUR-SEAL.

But I approach the matter a little more closely. What kind of animal is this? To what order of animal is it to be relegated? I do not care whether it is to be called a "fish" or an "animal", or what it is to be called:—what is it? If an animal, is it a land animal; or is it a sea animal? Well, I observe, in passing, that all through the legislation of the United States the seals are always spoken of in relation to "Fisheries". But that may not be very important. What are its natural appliances for living on land? Can it progress on land with facility? Does it get its support from land; or any of its support from land? No. The animal is one which Nature has not adapted for easy progression on land. It has got no legs; it has got no feet. It can flop, with great rapidity, for a few yards, 50 or 60 at the outside, and then it falls down exhausted; and a curious circumstance in relation to it is this, that it is manageable on land because it is wholly
963 helpless upon land, and has not been furnished by Nature with appliances which enable it easily to progress upon land.

In this connection, I would like to read one passage from the Report of Mr. Elliott in 1890, describing the character of this animal when it is being driven on land. I am reading from page 7 of his letter to the Secretary of the Treasury published with that Report. It is the third paragraph on that page.

The least reflection will declare to an observer that, while a fur-seal moves easier on land, and freer than any or all other seals, yet, at the same time, it is an unusual and laborious effort, even when it is voluntary; therefore, when thousands of young male seals are suddenly aroused to their utmost power of land locomotion, over rough, sharp rocks, rolling clinker stones, deep loose sand, mossy tussocks, and other equally severe impedimenta, they in their fright [This is the *domestic* animal] exert themselves most violently, crowd in confused sweltering heaps one upon the other, so that many are often "smothered" to death; and in this manner of most extraordinary effort to be urged along over stretches of unbroken miles, they are obliged to use muscles and nerves that nature never intended them to use, and which are not fitted for the action.

This prolonged, sudden, and unusual effort, unnatural and violent strain, must leave a lasting mark upon the physical condition of every seal thus driven, and then suffered to escape from the clubbed pods on the killing-grounds; they are alternately heated to the point of suffocation, gasping, panting, allowed to cool down at intervals, then abruptly started up on the road for a fresh renewal of this heating as they lunge, shamble, and creep along. When they arrive on the killing-grounds, after four or five hours of this distressing effort on their part, they are then suddenly cooled off for the last time prior to the final ordeal of clubbing; then when driven up into the last surround or pod, if the seals are spared from cause of being unfit to take, too big or too little, bitten, etc., they are permitted to go off from the killing-ground back to the sea, outwardly unhurt, most of them; but I am now satisfied that they sustain in a vast majority of cases internal injuries of greater or less degree, that remain to work physical disability or death thereafter to nearly every seal thus released, and certain destruction of its virility and courage necessary for a

station on the rookery, even if it can possibly run the gauntlet of driving throughou every sealing season for five or six consecutive years; driven over and over again a it is during each one of these sealing seasons.

Therefore, it now appears plain to me, that those young male fur-seals which ma happen to survive this terrible strain of seven years of driving overland, are rendere by this act of driving wholly worthless for breeding purposes—that they never go t the breeding-grounds and take up stations there, being utterly demoralized in spir and in body.

This is also to be found in the British Counter-Case, at page 264.

Now, Mr. President, it will probably occur to you or to some othe Members of the Tribunal, though we have heard a great deal of th inhumanity in relation to pelagic sealing, yet that probably, if the sea could have its choice whether it would have itself knocked on the head on the island after these renewed and protracted efforts of cruelty, as one alternative, or would take its chance of being shot in its natural element as the other, if it is half as intelligent as my learned friends in other portions of their argument assert it is, there can be very little doubt which the seal would choose. I am dealing with this, not for the purpose of attacking the management of the Islands, but for the purpose of citing the man vouched by the United States as a great authority on the seal question.

964 Mr. CARTER.—Where is that vouched for?

Sir CHARLES RUSSELL.—Again, and again, and again; and I will refer to the American authorities and executive officers of the American Government who have referred to Mr. Elliott as a great authority, one or more of them indeed referring to him as the only authority on sealing.

Mr. CARTER.—You do not refer to anything in the evidence befor the Court.

Sir CHARLES RUSSELL.—I do indeed. Mr. Blaine's letters, amon others, refer to Mr. Elliott as the great authority on seal life; and have certainly many other references.

I was upon the point of showing what the character of this anima is—that its helplessness on land arises from the fact that it is not reall a land animal. On the contrary, it is admitted that upon the sea it i at home: that it is capable of easy progression many miles in a day without any unusual strain upon its vital powers.

Now does it get its sustenance from the land? Not at all. It gets n sustenance from the land, and perhaps the passage I am now about t read on the question of what it does feed upon, may suggest to thi Tribunal that if the fur-seal does perish from the face of the earth, a the buffaloes have perished from the face of the earth so far as Amer can possessions are concerned, it will not be an unmixed evil. On pag 72 of the same book to which I am now referring, and referring only fo this purpose, there occurs this description of the food of these animal

Lord HANNEN.—I see it is in inverted commas. What is it quote from?

Sir CHARLES RUSSELL.—It is a quotation from Mr. Elliott's earlie Report of 1874.

Think of the enormous food consumption of these rookeries and hauling ground what an immense quantity of finny prey must pass down their voracious throats every year rolls by.

A creature so full of life, strung with nerves muscles like bands of steel, cann live on air, or absorb it from the sea. Their food is fish, to the practical exclusio of all other diet. I have never seen them touch, or disturb with the intention touching it, one solitary example in the flocks of water-fowl which rest upon th surface of the water all about the islands.

I was especially careful in noting this, because it seemed to me that canine arm ture of their mouths must suggest flesh for food at times as well as fish; but fish w

know they eat. Whole windrows of the heads of cod and wolf fishes bitten off by these animals at the nape were washed up on the south-shore of St. George during a gale in the summer of 1873. This pelagic decapitation evidently marked the progress and the appetite of a band of fur-seals to the windward of the islands, as they passed into and through a stray school of these fishes.

So apparently they destroyed a great deal more than they actually consumed: they bit the fish at the nape of the neck, the choicest part, and let the rest go.

Senator MORGAN.—Do you remember if any other witness besides Mr. Elliott has ever spoken of that fact.

Sir CHARLES RUSSELL.—I think every writer has spoken of the enormous consumption of fish.

965 Senator MORGAN.—But the partial consumption by biting off the heads at the nape of the neck.

Sir CHARLES RUSSELL.—I am not aware; it may be, but I do not know.

Senator MORGAN.—I think he drew on his imagination for that.

Lord HANNEN.—Yes, but he does not say that. He simply says their heads were bitten off. It does not show that some were bitten slightly and escaped. They probably reject that which they do not like.

Sir CHARLES RUSSELL.—I take it to mean that they ate the choicest parts.

Lord HANNEN.—But you added to it that some escaped. There is nothing in Elliott's Report about that.

Sir CHARLES RUSSELL.—No, I did not think the Senator meant that. I think I am right in saying that it is well known that otters, frequenting salmon rivers, will if fish is plentiful simply eat the back of the neck of the salmon and not eat the rest. That is an experience probably all of us who know anything about otter hunting are quite aware of.

How many pounds *per diem* is required by an adult seal and taken by it when feeding is not certain in my mind. Judging from the appetite, however, of kindred animals, such as sea-lions kept in confinement at Woodward's gardens, San Francisco, I can safely say that forty pounds for a full grown fur-seal is a fair allowance, with at least ten or twelve pounds *per diem* to every adult female, and not much less, if any, to the rapidly growing pups and young "holluschickie." Therefore, this great body of four and five millions of hearty, active animals which we know on the seal islands, must consume an enormous amount of such food every year. They cannot average less than ten pounds of fish each *per diem*, which gives the consumption, as exhibited by their appetite, of over six million tons of fish every year. What wonder, then, that nature should do something to hold these active fishermen in check.

Mr. CARTER.—He revises those observations on page 307, I see.

Sir CHARLES RUSSELL.—I am obliged. I will refer to it with pleasure. I had not noticed it.

Mr. CARTER.—It begins in the middle of the page at the words "Using the above as a suggestion".

Sir CHARLES RUSSELL.—

Using the above as a suggestion, several writers have hastily assumed that it would be a good thing if the seals were exterminated—that by exterminating them, just so much more would be given to our salmon and cod fishermen to place upon the markets of the world. These men forget the fact that all animal life in a state of nature existing to-day as the fishes and seals do is sustained by a natural equilibrium, one animal preying upon the other, so that year after year, only so many seals, so many cod, so many halibut, so many salmon, so many dog-fish, and so on throughout the long list, can and do exist.

That is dealing with the state of nature.

Mr. CARTER.—But it goes on.

Sir CHARLES RUSSELL.—Very well, my learned friend, Mr.
966 Phelps, will refer to it if it is important. I referred to him not for the purpose of shewing the food they consume, but for the

purpose of shewing they were sea animals. So much therefore as to being fitted for land and deriving no food from land; and so far as we have progressed, it stands thus, that as regards formation, as regards the food on which they live, as regards the element in which they move most easily and most naturally, they are sea animals—free swimming sea animals. These facts have some legal bearing. It is said that this sea animal is a domestic animal, or that it is to be relegated to the category of domestic animals; I have pointed out already in my opening observations that this is the first time that such a proposition has ever been advanced in the history of the world, and I have to point out that if I am right in saying that it is a free swimming sea animal, and if I am also right in pointing out that for the greater part of its existence (I will come to the justification of that in a moment) it spends its life in what I have called its natural element, in which not only no authority is exerted over it, but no authority can be exerted over it, then I say it belongs, so far as legal assertion of property in it is concerned, exactly to the same category (though the difficulties are even greater in this case) as the birds of the air or any fish or free swimming animal in the ocean. My learned friends, on the other hand, say it is to be relegated to the same category as cattle on the plains—the boundless prairies of the American Continent.

My learned friends, surely, did not suppose that we were ignorant of what is the legislation in the United States, and in each of the States I believe, upon the subject of cattle on the plains: that there is a regular system there of branding each individual member of the herd; that these branded marks are the subject of legislation, and are required to be publicly announced, publicly advertised, or, as we should say, registered, so that the trade-mark of one man may be distinguishable from the trade-mark of another man; and, I speak subject to the correction of my learned friends, I think it will be found that, even in the case of cattle on the plains, which admittedly belong to the category of domestic animals, if these branding marks are omitted, or are not registered, there is very great difficulty in the owner, who seeks to claim them, establishing his right of property at all.

Now, it is said that these animals resort to the Islands to breed, and resort there in compliance with what has been picturesquely described as the "imperious instincts of their nature". They do.

And when they get there, what do the representatives of the United States do? Can they do anything to improve the breed? Nothing. Do they make any selection of sire and dam, of bull and cow? Indeed, could they? No. What do they do? They do two things, one positive the other negative, and two things only. The positive thing is that they do what a preserver-game does; he has a gamekeeper to prevent poaching; they have people on the Islands to prevent raiding. The negative thing that they do is that they do not kill all. They
967 knock on the head a certain number, but exercise a certain amount of discrimination or a large amount of discrimination. That is the whole sum and substance of what they do, no more, no less.

Let me illustrate my meaning. Suppose the existence, which there may well be in some undiscovered region, of an Island where there are seals; what does the United States do on the Pribiloff Islands that Nature, unassisted, does not do on the undiscovered Island?

The only thing that Nature does not do is that she does not knock them on the head. Therefore, as they do nothing to bring the seals there, so, when the seals are brought there, they do nothing in regard to them to improve their stock or to increase their stock; and except for

the control, whether effective or not I do not care, by which raiders are kept off by the representatives of the United States, or of the lessees, upon the Islands, they do nothing, except the negative act of not knocking some of them on the head, exercising, with regard to killing, as I have said, a certain amount of discrimination.

Do they do anything to induce them to go there? No, they do not. On the contrary, if they were to attempt by any kind of artificial means to provide for the reception of the seals, it would have the effect of driving them away, not of inducing them to come. Unlike the case of the bees,—the wild hive of bees, for which the man desiring that hive provides a mechanical contrivance, and also the beginning of a supply of food for them to induce them to form their combs of honey,—unlike the case of the doves, for which the owner supplies food and a dovecote where they get shelter from the weather, the owners of the Pribiloff Islands do nothing; and if they were to do anything, it would have the effect of repelling rather than of inducing them to come.

Now, let me go a little further. It is said that they come to the Islands, and I think I must refer to the very words in which this is put,—I could not do justice to the pathetic language used in this case if I did not read it,—it is said, not only do they come to the Islands, but that they "voluntarily submit themselves to the control of man", and have entered into a kind of treaty ("pact" I think is the actual word used) to yield up a certain proportion of their skins in consideration of the protection that man affords them and in return for it. Let me read it, so that it may not be said I am doing an injustice to this passage. I read from page 92 of their Argument.—

> In the added light thrown by this inquiry into the foundations of the institution of property the case of the fur-seal can be no longer open to doubt, if it ever was. It is a typical instance.

Now, this is the sentence which I desire to read.

> Polygamous in its nature, compelled to breed upon the land, and confined to that element for half the year, gentle and confiding in disposition, nearly defenceless against attack, it seems almost to implore the protection of man, and to offer to
> 968 him as a reward that superfluity of increase which is not needed for a continuance of the race.

The other passage to which I wish to refer, where the phrase is used, is on page 47.

> The Alaskan fur-seals are a typical instance for the application of this doctrine. They are by the imperious and unchangeable instincts of their nature impelled to return from their wanderings to the *same place;* they are defenseless against man, and in returning to the same place voluntarily subject themselves to his power, and enable him to treat them in the same way and to obtain from them the same benefits as may be had in the case of domestic animals.

Now, what is the meaning of that phrase, "voluntarily submit themselves to his power"? Does it, in fact, mean more than that they come to the Islands and breed, and that, being on the Islands to breed, they can be the more readily knocked on the head? But, in the sense of saying that they do voluntarily and of their own free-will submit themselves to the control of man, the idea is absurd on the face of it and it is unsupported by facts. They come, "by the imperious necessity of their nature" (if I am to adopt that rather grandiloquent expression, which I am willing to do), to breed on the Islands; they are in a position in which man can readily knock them on the head; but it is absurd to say that they come to the Islands to submit themselves, or that they do submit themselves, voluntarily, by the exercise of any volition on their part, to the control of man, in the same sense of the word as domesticated animals undoubtedly do.

They submit themselves to the control of man just in the same sense, and in no other sense, as they submit themselves to the control of the killer-whale when they go out into the sea where the killer-whale can catch them. They are safe from the killer-whale on land; but they are obliged, "by the imperious instincts of their nature", to return to the sea, and there they return to a place where they are exposed to the ravages of the killer-whale; and it would be as true to say that they *voluntarily* submit themselves to the ravages of the killer-whale as to say that by resorting to the Islands they *voluntarily* submit themselves to the control of man. You might as well say the turtle, that comes to deposit its eggs in the sand to be hatched by the rays of the sun, coming upon the land indeed "by the imperious and unchangeable instinct of its nature" submits itself to the control of man because man may take advantage of the opportunity to knock it on the head; or, as my learned friend reminds me, may begin by turning it on its back and keeping it on its back a certain time before it is knocked on the head.

Then the next thing said is this; they have, by this imperious and unchangeable instinct of their nature, the *animus revertendi*. And then the United States say they constantly come back to us, and even if we do nothing to domesticate them, even if we cannot found a property in them *per industriam*, even if we do nothing to induce them to come there or to give them this habit of returning, yet the fact of their coming back gives us a property interest. Now, with great deference, this is an entire misconception of the doctrine of *animus revertendi*. First of all, I know of no case, and my learned friends have cited none, in which this doctrine has ever been applied to the case of migratory animals.

Animus revertendi.

969

Could it be applied for instance to the wild ducks that breed in the northern parts of the Canadian territory and come down at a different season to the south, afterwards returning to the north? There is no case that I am aware of decided on this doctrine of *animus revertendi*, or which has any reference even to it, unless the habit or custom of returning operates after a short interval calculated by hours, or perhaps by days. As truly might you say that there was the *animus revertendi* to the ocean as an *animus revertendi* to the Pribylof Islands. When you get an animal which spends half its life in one place and half in the other, I think it will be found that this doctrine of *animus revertendi* has no bearing on the question.

But there is another ground on which the reference to this doctrine has been entirely misconceived. There is no case that I am aware of, and I speak subject to correction, but certainly none has been cited, where *animus revertendi* has been referred to in connection with the right of property, except where the *animus* has been induced by the effort or industry of man.

Where the instinct belongs to an animal and it acts according to its influence, where man has nothing to do to get it to return, where man has nothing to do to foster that return, where man has nothing to do to induce it to return, as by providing home or food, the doctrine of *animus revertendi* has no application. And I may illustrate my meaning I think in a sentence. I will take three or four well known classes of animals: pheasants, rabbits, grouse, hares. Let us see what happens in each of these cases.

What does the man who raises pheasants begin by doing? He begins by stealing the pheasants' eggs out of the nest in order to induce the hen pheasant to lay more eggs; and, having done that, he proceeds to hatch the eggs he has abstracted under a common barn-door hen.

When the birds are young he feeds them, and when they are old he feeds them. They spend a great part of their time on his land, but they make excursions to adjoining land which is not his, and they return to his land because they expect to be fed there.

Take again rabbits: you have a warren in a sand-hill on your estate, which supplies very little food indeed to the rabbits, but which gives them every facility for constructing their houses or burrows in the sand. They go elsewhere, it may be to another estate of yours, it may be upon your neighbour's estate, in the dead of the night, or early morning, for their food; and then they come back to your warren. They have, by the imperious and unchangeable instincts of their nature, the *animus revertendi.*

And with grouse almost the same thing happens.

970 So with wild deer. One may multiply the instances. These animals all have the *animus revertendi:* but has any law ever said, though there are cases in which you actually induce them to return by making them homes, and even by giving them food, that your neighbour, when they are off your land, may not shoot them as wild animals. No: no case has ever said anything of the kind. No case ever could say anything of the kind.

I go a little further. It is stated in this case,—and I am at present engaged, as the Tribunal will see, not in building up an affirmative argument, but in examining and analysing the argument put by the other side: taking it to pieces, as I hope successfully—it is said in the case, and was repeated, to my amazement, by Mr. Coudert, if not also by my learned friend, Mr. Carter, that when the seals were on the island they were the complete and absolute property of the United States or their lessees.

Thereupon Senator Morgan very astutely put the question: if they are the absolute property of the United States or their lessees when they are on the islands, when do they cease to be their property, and how do they cease to be their property,—a very proper question indeed. But there is much virtue in an "if." "If" they are their property on the islands, they are their property off the islands. But my learned friends have utterly failed to grasp—I see no trace of it in the whole of the argument, written or oral,—the distinction between the right to take a thing when it is on your land, from which land you can exclude everybody else, and an absolute right of property in the thing itself. Surely it is a legal conception capable of very ready and easy apprehension, recognized by all systems of municipal law, in all civilized countries, that on the land you have a right to exclude everybody else: you have a right to treat that somebody else as a trespasser. It follows from that that you have the right to take what is on the land, even though it be wild; and the right to exclude others from the opportunity of taking it. But it follows also, that when the wild animals are off your land your exclusive right ceases. Thus it is that the owner of the land has a special right by reason of his right of ownership, of taking the wild animals on his lands: the right known as *ratione soli.* This fundamental principle I find no trace of in the argument written or oral of my learned friend; but it is a principle which it is important and very essential to be borne in mind in this case.

Now let us look at the question again by the light of an application of my learned friend's doctrine of property in seals. What does it import? What are the consequences of it? It imports this, that if they are property on the Islands they are property everywhere; and

herein I agree thoroughly with my learned friend Mr. Carter (one of my few points of agreement I am afraid) that once you establish the right of property the law will suppose you are in possession, even though you have lost the physical control and dominion over the thing.

You do not lose your property if you once have it, if it escapes out of your hand; you do not lose your property in your sheep or horse, or in any other animal as to which you have an absolute right
971 of property, because it may have strayed miles, even hundreds of miles, away; and therefore if there is property in these seals the property attaches wherever they are.

Senator MORGAN.—A case of constructive possession.

Sir CHARLES RUSSELL.—Quite so. That is a convenient expression. But that is only where you have the property in the same sense, to use Mr. Carter's illustration, as you have property in a ship. What consequences does this lead us to? It leads us to those absurd consequences from which my learned friends most naturally seek to escape, but from which they cannot escape, namely, that if there is property on the Islands there is property a thousand miles away from the islands. And one might invent, or one might imagine, a colloquy between a representative of the lessees of Pribilof Islands and a pelagic sealer off Cape Flattery. The pelagic sealer is about to shoot a seal which he sees there, and the agent of the lessee says: "No you must not, that belongs to me". "Well, when did you see it last?" "Well I do not know that I ever saw it before." "How do you know it is yours?" "Well I cannot be quite certain that it is mine. I have no mark upon it, but I think it comes from the Pribilof Islands". "You say the property is yours. Do you say that that particular seal is yours?" "Well I cannot quite say that; it is not necessary that I should say that; but it belongs to a lot of seals; we call them a herd,—though I cannot quite undertake to say that particular seal is mine I am pretty sure it is one of a lot of seals that probably came from the Pribilof Islands. You must not shoot him, because when he goes back, as I expect he will (I am not sure) by the imperious instincts of his nature, to the Pribilof Islands I intend to knock him on the head". I need not say the seal, not interested in this discussion, has meanwhile disappeared, and his life is so far prolonged. But does it not present the absurdity of the argument of property in the individual seal, so that as one may say, *ça saute aux yeux*.

Need I dwell upon the farther consequences, namely, that in defence of this property in the individual seals, or in the seal herd, it is claimed by the United States that they may search and seize ships that they believe to be engaged in pelagic sealing, and, if they make good the accusation, confiscate such ships?

Now let me just see whether the facts which I have so far mentioned as characteristic of this animal are not facts as to which there is no doubt or dispute. Is there any real dispute that the animal is a sea animal, a free swimming animal? Is there any dispute that it spends at least half of its time in the open sea? I think not. My learned friend, Mr. Coudert, went the length of saying that it spent eigh months of the year on the islands. Now that, upon the examination o the figures, will be found to be quite incorrect. It will be found that: much nearer approximation is from three to five months in the yea and the way in which the longer period has been arrived at has bee by taking the date of the earliest arrival and the latest departure; bu if you take the mean it will be found somewhere between fou
972 and five months, taking each class of seal; the argument tha we have put forward on this point, seems to be warranted by th

figures given. It is not much more, if anything more, than a third of each year. So far, therefore, there is very little difference between us. I am not concerned however to demonstrate that the seal is a sea animal. Probably the true explanation is that it is partly a land animal and partly a sea animal, or in other words, what is commonly called "amphibious"; but that does not seem to be very important.

Is there any dispute about the other facts which are important on the question of property: that it gets no sustenance from land, there is no dispute as to that: or upon the fact that the lessees of the United States do nothing artificially to induce it to come to the islands, and that if they did try to do anything artificially to induce it to come to the islands, it would probably have a repellent effect. There does not seem to be any dispute about that.

Then what does it come to? It comes to this: that it is an animal which breeds on the islands, and resorts to the islands mainly to breed. That will be found to be, ultimately, the material fact in the controversy upon the question of property. But how about the character of the animal itself? Is it, or can it be called, a domestic animal?

Now I would like to refer to one or two points in this connection which I think are not unimportant. We have one instance given in the United States Case, where an attempt was made to tame a young seal, and I would like to refer to it as it is the only one I think that is given. The story is given on page 33 of the Second Volume of the Appendix to the case of the United States. It is the case of a pup called "Jimmie". He was very short-lived. How he got his name does not appear; but the accident of his birth is mentioned at the beginning of the section:

> Little "Jimmie", as this particular pup was called, was the child of adverse circumstances, as his mother happened accidentally to be caught in a large drive and could not be separated from the herd until the killing ground was reached.
>
> Shortly after being parted out and allowed to go free, on her way to the water, she hurriedly gave birth to this pup and continued on her journey. The pup was watched carefully for a few days, and when it was thought to have been deserted a kind-hearted employé of the Company, Mr. Allis, brought it into the village with a double view of trying to save its life as well as to make a pet of it.
>
> For the first few days, as nobody could manage to make him eat, and as he would generally get the best of some friendly finger in these attempts at feeding he was let severely alone. Then followed various contrivances, mechanical and otherwise, for holding his head so as to feed him with a spoon or a nursing bottle, but all to no purpose, for he would get most of the milk everywhere but where it was entended to go. This went on for all of two weeks or more. I then equipped myself with a large syringe and a flexible tube and about a pint or so of warm fresh cow's milk. Little "Jimmie's" mouth was kept open, the tube was passed down his throat into his stomach, the syringe filled with milk, in quantity as before stated, and which was unanimously agreed was not too much for him at one feeding, was slowly injected down the tube into his stomach.
>
> After the operation the tube was carefully withdrawn, and "Jimmie" was left to his own devices. The pup, much to the gratification and amusement of all present, immediately began to show in the most unmistakable manner the greatest of seal
> 973 delight, i. e. to lie down in the various positions of seal comfort, on his back and side, and wave and fan himself with his flippers, scratch himself, bleat, etc. As these signs were unmistakable to all present who were familiar with the habits of seals, the operation was thought to be a success. Up to the last time the pup was seen, late that night, he was doing finely, but next morning he was found dead, and I attribute his sudden taking off either to the small boy or an accident during the night".

I believe that is the best authenticated instance—the only one that I am aware of—of an attempt to domesticate the seal: the seal which we are told could be induced to follow you—which was semi-human in its intelligence—which kept appealing to you for aid and protection.

Now, Mr. President, in this connection, I want to read one or two passages from the same volume. The first is at page 69, which expresses,

very strongly, the domestic and gentle nature of this animal. I think it is the strongest passage of this character, and therefore I read it.

The name of the gentleman is Morton, who was the Agent of the lessees and Treasury Agent on the Pribiloff Islands, and he says:

I believe the American Government to be justified in assuming and maintaining the absolute proprietorship of the American seals. They may, I think, in the broad sense of the word, be regarded as domestic animals.

Well, I think it requires a very "broad sense" indeed. Then he proceeds:

They certainly possess qualities of a domestic nature which are susceptible of a high degree of development. During the first two or three months of their lives they are as gentle and docile as most domestic animals:

Well, "Jimmie" was not.

They may be handled and petted, will accept food at one's hands:

"Jimmie" would not.

can be taught to follow one from place to place, and in various ways are amenable to intelligent guidance and training. Even at mature age they are subject to as much control as are sheep or cattle.

They may be driven here and there at will; may be separated and driven together again; divided into groups or "pods", great or small, or be herded by thousands with less effort and trouble than bands of cattle are herded on the plains. They are far from possessing that excessive timidity which has been popularly attributed to them. They soon grow accustomed to the sight of man, and in the absence of offensive demonstration on his part quickly learn to regard his proximity with indifference.

Now I have read that passage because it is the strongest that I could find as to the general statement of the domestic character of this animal. Now let me contrast it with a passage which shews what is the true character of these animals, how frightened they are of man, and what efforts they will make to escape from human control. I turn to page 162, and I wish to point out that the statement which this witness makes is for the purpose of shewing the enormous vitality, as he con-
974 ceives, of the seals—their enormous powers of endurance and vitality. About the middle of page 162, you will find this.—

I never saw or heard of a case where a male seal was seriously injured by driving or redriving.

Then he proceeds to say how they fight on the rookeries, receive wounds, and yet are full of vigour.

Now the next passage I wish to read is this:

To show the wonderful vitality of the male seal, I will give one instance which came under my own observation: A drive of about 3,000 bachelors had been made, and after going a short distance was left in charge of a boy; by his negligence they escaped from his control, and the whole number plunged over a cliff, falling 60 feet upon broken stones and rocks along the shore. Out of the whole number only seven were killed, the remainder taking to the water; and these seven met death, I believe, from being the first to go over and the others falling upon them smothered them.

These are the animals which are easily handled, but which, actually, in order to escape from man, will jump down a cliff sixty feet, pell-mell, helter-skelter, upon the top of one another; and yet they are said to be so easy to control that you may drive them and round them up as you would round up cattle upon the plains.

I may of course be misapprehending the effect of this passage. If so, I should be very glad to be corrected and put right; but to say that an animal which will expose itself to the terrible risk of loss of life and serious injury by jumping down a cliff sixty feet high, which will rush

wildly away, wholly regardless of the consequences to itself, from the attempt of control of man, is not manifesting timidity in the presence of man seems to me very difficult to understand and appreciate. I may not understand this statement rightly. If I do not understand it rightly, the judgment of the Tribunal will set me right, or my learned friend Mr. Phelps, when his time comes; but I can myself suggest nothing which more strongly points to the timidity of the animal, and its fear of man, than the fact that in its endeavor to escape it will attempt to perform acts such as these, which it must be apparent, even to its limited intelligence, are fraught with personal injury and danger to themselves. He says seven of them were killed, he cannot tell how many more, for they may have been so injured that death may have resulted as a consequence.

Is there anything else, when you come to facts, which shows any capacity to control or domesticate the seals? I know of nothing; but not only that, I know of a fact which renders complete domesticity impossible, and that is that if you attempted to keep these animals under control and on the land, they would inevitably die. Therefore the case is stronger than that of most wild animals; because, as regards many wild animals, you may keep them under such close confinement, and in such close custody, and under such close physical control on the land, as to preserve the opportunity of knocking them on the head or
975 cutting their throats whenever you like; but you cannot do that in the case of these seals, because if you confine them or even attempt to keep them under your control on the land, where alone you have any means of exercising power over their motions or their directions, you kill them. It is by the "imperious necessity of their nature" that they must go to sea.

So far as I have yet gone, it seems to me that all these facts that I have dwelt upon are common ground; that there is really no difference about the facts, so far as I have dealt with them; and that, in my judgment, for the reasons I shall presently give, they are conclusive upon the question of property. But there are one or two other facts which I think it is important to ask the Tribunal to regard, which I cannot say are admitted facts, but as to which I can only say that there is a body of evidence in regard to them. The first that I refer to is the question of intermingling of the seals frequenting the Pribilof Islands with other seals from different places. That is established principally by reference to the character of the skins of these animals; and I wish to point out how the evidence stands in relation to this question of pelage.

The question of intermingling of the "hords".

The consignments of the Commander and Copper skins, which are from the Russian Islands, come by different routes to those who deal with them in the way of commerce in London. The consignments from the Pribilof Islands, equally, are a separate consignment, and reach the market as a separate consignment. And thirdly, there is the Northwest catch, which is the name used to describe the pelagic catch. That again finds its way to the market by a different route, through different agencies, and as a separate consignment. It appears to be undoubted that the Alaskan fur-seal skin has attained a higher reputation in the market than any other fur-seal skin. Whether that is partly owing to the fact that it is the oldest fur-seal known in the market, or whether it is that the name has become attached to a skin of a particular quality, or partly one and partly the other, I do not quite know; but if I am able to show that in each of these consignments there will be found to be a mixture: in the Alaskan consignment an admixture of Copper and

Commander skins, and in the Copper and Commander consignments a mixture of Alaskan skins, and in the Northwest catch a mixture of both: and in all—which is to me the most singular fact—a large percentage of skins approximating to the character of Alaskan skins, or approximating to the character of Copper and Commander skins: then I think it is impossible to resist the conclusion that there is a much wider intermingling, and not only intermingling but interbreeding, in the seal family in this part of the North Pacific than is admitted by my learned friends on the other side.

Senator MORGAN.—I believe there is no doubt that expert witnesses can certainly trace the distinctions between these different skins of different islands. You have no doubt on that point?

Sir CHARLES RUSSELL.—You will see, Sir, what it leaves no
976 doubt upon when I call attention to the evidence, which I propose to do in a moment or two. This fact, if it be the fact—I am not treating it as an admitted fact at all; on the contrary it is denied—but this fact, if it be a fact, of intermingling and interbreeding is only what you would expect. It is a thing you would probably look for; because here at least we are on common ground, namely that the seals wherever they are found, whether in the Northwest Catch or the Russian Catch or the Alaskan Catch, or along the Southern shores, are all of the same species. Therefore, there would be nothing unnatural, on the contrary there would be everything natural, in the fact of their interbreeding, if they intermingle. Then is there anything unnatural or improbable in the fact of their intermingling? No. If the evidence which I shall call attention to in a moment is well founded, it will be seen that although there are two great divisions—one of which goes south east in its migrations, and the other goes south west in the autumn and winter—, yet that they are not two distinct armies, so to speak, in regular Indian file, following one another, but that they are scattered over the whole ocean in a greater or less degree: and that in point of fact there is no part of the ocean in which they are not to be found, and in considerable numbers, at any time during the period of their annual migration.

That again is what one would expect, for a very obvious reason. These are amphibious animals, that live upon fish, and upon fish only. They would, in the pursuit of their natural food, follow such variations as might be suggested to them by the pursuit of their food, the schools of fish being here at one time, and there at another time; and so this intermingling would be brought about.

Lastly, and this is the only other point in this connection which I wish to dwell upon, I think that it will be found to be an entire mistake to suppose, as is suggested on the other side, that during the breeding season the whole seal family make their way to the Pribilof Islands and to the Commander and Copper Islands, and that the whole family or whole families are there on or in the immediate neighbourhood of the islands during that breeding season. That will be found not to be the case. It will be found upon the evidence that even in the height of the breeding season, in the month of July and in the month of August quantities of seals are to be found all over the seas—I mean at some considerable distance from the coast—as to which the probability is that a very large part of them are barren females, young bachelors and old seals, that do not go to the islands at all; and that as regards the female seal, the evidence, even from the witnesses of the United States, is to the effect that from the moment she leaves the island in the autumn of the year in which she was pupped, she does not return

to the island until the sexual instinct prompts her return there at two or three years of age, and that she does not return in any permanent sense to the island at all until she comes to deliver her first pup.

Those are points as to which I shall have to trouble the Tri-
977 bunal with reading some passages in the evidence. I think they have some bearing upon this question of property.

The Tribunal here adjourned for a short time.

The PRESIDENT.—Sir Charles, we are ready to hear you.

Sir CHARLES RUSSELL.—I am now about to refer, Mr. President, to the evidence of the intermingling, which, as I have said, is not an admitted fact. I have pointed out the reasons why I conceive it to be probable and natural. I will now call attention to the evidence which proves it; and in calling attention to that evidence it will be found to answer the question addressed to me by Senator Morgan.

The PRESIDENT.—We should like, Sir Charles, for one moment, to refer to the English maps which give the course followed by the seals in general. We have the map in the Report of the British Commissioners, which illustrates the resorts and the migration routes of the fur-seals in the North Pacific generally; and we shall be able to follow you.

Sir CHARLES RUSSELL.—I do not intend, Sir, to refer to the map, nor would it aid the Tribunal, in following my argument, to have it before them; I was upon the independent testimony as to the fact of intermingling.

The PRESIDENT.—Is there any contradiction between these maps and the others?

Sir CHARLES RUSSELL.—I do not think there is any contradiction. The further Report of the Commissioners, in view of the further information that they have obtained, undoubtedly points to the fact that although there may be said to be two clearly marked main routes of migration south, yet that it would be incorrect to assume that the whole body of the seals are gathered into one or other of these routes—that there are still a considerable body or seals attached to neither route, but scattered over the whole sea from land to land. The point I was upon was the evidence that goes to show intermingling; and the same evidence will answer the question addressed to me by Senator Morgan as to whether or not it was possible to predicate, as to particular skins, whether they were Alaskan, or Copper, or Commander skins; and the answer will be found to be, that in some cases—in a great many cases—there are skins which they say are Alaskan without doubt; a great many which they say are Copper without a doubt; but there a great many also which they say are undistinguishable from either, and partake of the qualities and characteristics of both. That is the tendency of the evidence. It begins at page 230 of the second volume of the Appendix to the British Counter-Case; and it is the evidence of the same persons, or a great many of the same persons, whose evidence has been utilized by the United States for other purposes. I will only read what is absolutely necessary, and I will commence with the 6th paragraph of the affidavit of Mr. Poland, in which he says:

In inspecting the shipments made through Messrs. Lampson from the Pribilof Islands, I have from time to time noticed the presence amongst them of skins which were undistinguishable from Copper Island skins, and also in the same way
978 I have noticed amongst Copper Island consignments skins which are evidently of the Alaskan description. I have also noticed skins in both classes which in a lesser degree resemble the other class.

I dwell on this particularly, because my learned friend Mr. Coudert was, as I conceive, rash when he said—"It would be something if it

could be shewn that Coppers were found amongst the Alaskans, or Alaskans amongst the Coppers." My friend, I think could not have had his attention drawn to this evidence.

Then on the next page—page 231—is the declaration, in French, of Mr. Leon Revillon. It is the last paragraph that I call attention to:

En examinant les peaux envoyées des Iles Pribilof par l'intermédiaire de Messrs. Lampson de Londres, j'ai remarqué de temps à autre qu'il se trouvait parmi elles des peaux qu'on ne pouvait pas distinguer de celles venant de "Copper Island", et j'ai également observé dans les envois provenant de "Copper Island" des peaux qui sont en toute apparence de la description de celles dites "d'Alaska". J'ai remarqué aussi que dans chaque classe des peaux il y en avait qui ressemblaient dans un moindre degré à l'autre classe.

Now in turn to page 235, and will read paragraph 6 of the evidence of Mr. Ince:

In inspecting parcels of skins from Pribilof Islands sold from time to time by Messrs. Lampson, I have noticed amongst them skins of seals which I should have thought, had they not been there, were from the Commander Island skins, and, in the same way, in inspecting skins of Commander Island seals, I have noticed amongst them skins just like Alaskas, and, of course, in each class I have noted skins of the other class, but of a less marked degree of similarity.

Now on the next page is the declaration of Mr. Sydney Poland; and in paragraph 6 he says:

In examining Alaska consignments from the Pribilof Islands sold by Messrs. Lampson, I have noticed among these skins which, in my opinion, were absolutely undistinguishable from Copper Island skins, and in the same way I have found among skins consigned from the Copper Islands, skins which were undistinguishable from Alaskas, and of course also many skins in each class which in a less degree resembled the other class.

Then in paragraph 7 he says:

In their dressed and finished condition it is exceedingly difficult, and to my mind impossible, to distinguish an Alaska from a Copper, and I assert that if half-a-dozen of each description manufactured into jackets were put before any dealer, however experienced, he would find it impossible to tell one from the other.

I read, next, from the declaration of Mr. Lansdell. At the top of page 237, in paragraph 5, he says:

I have found among the Alaska consignments sold by Messrs. Lampson, skins which it would be impossible for me to distinguish from Copper Island skins were it not for the fact that they were in the Alaska catalogue, and also among Copper Island consignments I have found in the same way Alaskas.

Then at the bottom of page 237, Mr. Jay of Regent Street, London, says, paragraph 5, of his declaration:

In inspecting consignments from the Pribilof Islands sold by Messrs. Lampson I have repeatedly observed amongst them skins which were to my mind undis-
979 tinguishable from skins from the Copper Islands; and, in the same way, in inspecting consignments from the Copper Islands, I have noticed amongst them a considerable quantity of skins which I could not have distinguished from Alaska skins. I should not like to say what the percentage of these skins would be, but I should think that 25 to 30 per cent was probably a fair average.

The next is Mr. Boulter, paragraphs 2 and 3, page 238.

The three best known descriptions of seal-skins are (a) the Alaskas, which come from the Pribilof Islands; (b) the Coppers, which come from the Commander Islands; and (c) what is known as the North-West catch.

I have carefully considered what difference there is between Alaskas and Coppers.

Then Mr. Politzer, paragraph 2, is to the same effect. I will not trouble the Tribunal by reading that; but, in the next paragraph, paragraph 3, the top of page 239, he says:

I have noticed in inspecting the consignments from the Pribilof Islands skins (sometimes as many as 30 or 40 per cent) which were perfectly undistinguishable

from Copper Island skins, and in the same way, in inspecting consignments of skins from the Commander Islands I have noticed skins which were similar to Alaskas. and of course in both classes I have found skins which in a lesser degree resemble the other class.

So again Mr. Halsey speaks to the same effect. I will not trouble the Tribunal by reading each one of these.

So Mr. Slater, on page 240.

So Mr. Weber, on pages 240 and 241.

So Mr. Jungmann, of Paris, and, in paragraph 4, you will see he says the same thing.

So Mons. Émile Hertz, of Paris; at the top of page 242, he says:

At the request of the Representative of Great Britain, I declare in addition thereto that I have from time to time seen among the consignments of Alaska seals offered for public sale by Messrs. Lampson and Company, of London, skins resembling Copper Island skins, and among the consignments of this latter sort skins resembling the Alaska kind, but I believe it to be impossible to affirm absolutely that these doubtful skins belong to one or other of these two localities.

So Mr. Grebert.

So Mr. Haendler.

So Mr. Eysoldt; who says in paragraph 5, on page 243.

In consignments that I have inspected from the Copper Islands, sold by Messrs. Lampson and Company, I have noticed a certain percentage of skins which, had I seen them elsewhere, I should have considered them Alaska; and in the same way I have found skins amongst Alaska consignments that I have inspected which resembled the Copper description.

It is a matter of considerable difficulty to say what is the exact percentage I have so noticed, but I think it would be a safe estimate to say that, in the Copper consignment, I have found from 25 to 30 per cent, which resembled Alaskas, and in inspecting Alaska consignments about the same percentage of skins which resembled Coppers.

So Mr. Friedeberg, paragraph 4, page 244. He puts the percentage from 20 to 40 per cent.

980 So Mr. Creamer, in paragraph 4; he puts the percentage at rather less, I think.

So Mr. Stamp, whose evidence has been dealt with by Mr. Coudert as perfectly reliable, and I have no doubt it is. He says in paragraph 3.

In my opinion, there is no absolute line of demarcation between the Copper Island skins and Alaskas; and in inspecting the consignments made each year from the Pribilof Islands through Messrs. Lampson and Company I have found a certain percentage of skins which were *fac similes* of Copper Island skins; and in the same way, in inspecting the consignments of Copper Island skins, I have seen skins which, had I seen them elsewhere, I should have classed as Alaskas, and also a certain number of the intermediate degrees of similarity. The qualities of the skins vary greatly in different years; some years the Coppers approach in quality very closely to the Alaskas.

Then he speaks, in paragraph 5, about noticing females among the recent consignments.

So Mr. Apfel, on page 246; but I do not think I need trouble the Tribunal with any more of this evidence.

Mr. Henry Poland's statement is at page 250.

Now, unless I am mistaken, the Tribunal cannot fail to attach importance to this evidence, because it must be recollected that the case of the United States has been that, although they do not go the length of saying that the Alaskan fur-seal is a distinct species, yet they say that the seals that frequent the Pribilof Islands are a family of seals, of which no doubt there are other species in the Ocean, that keep their own society, that go on definite routes to the South, that go on definite routes to the North and make the Pribilof Islands their home. Well, of course, it is obvious that if these facts, which have been vouched by

these gentlemen, are true, there cannot be any such distinction of family as they allege, and the more they assert a distinctive character for the Alaskan fur-seal skin, the more they assert that the Alaskan fur-seal skin is superior in character, by reason of the density of its fur, the stronger becomes the evidence of intermingling and interbreeding. If you find this large percentage of an entirely different set of skins mixed with the Alaskan, if you find a large class in this consignment where the qualities of the Copper and Alaskan approach one another, that is the strongest evidence that could be given not merely of intermingling but of interbreeding of these different branches of this species of the fur-seal.

There are one or two other points in that connection which I think it well also to notice; namely, that upon examination it will not be found that the theory presented of an annual migration north of what I may call, for brevity's sake, the Alaskan seal family,—north to the Pribilof Islands,—and a migration south of the same family, so that the southern resort of this fur-seal family would be vacant during the breeding season when the main portion of the family were on the Pribilof Islands, will not be found to be well established; and for that purpose I will refer the Tribunal to one or two points, not at any length, for I
981 am very anxious to get over the ground, to show that at all times of the year there are to be found (and my evidence will be principally directed to the months of June, July, August and September when the breeding season is all over) seals south of the Aleutians, and north of the Aleutians as well.

The first reference I shall make is to the Report of the British Commissioners at page 175, where there is set out a very interesting letter from a gentleman named Swan, who seems to have taken a great deal of interest in seals. He is a gentleman who lives at Port Townsend in Washington territory and is a United States judge in that neighbourhood.

Mr. PHELPS.—No.

Mr. Justice HARLAN.—He is not a United States Judge I think: if that be important.

Sir CHARLES RUSSELL.—If I have done him an injustice I am sorry.

Mr. Justice HARLAN.—He may be a Judge in Canada.

Mr. TUPPER.—No he is not.

Sir CHARLES RUSSELL.—Probably, Mr. President, when each of these great countries disclaim him, the United States on the one hand and Canada on the other, the explanation is to be found in the fact that he is a collector of customs.

Mr. PHELPS.—No, he is the owner of a sealing schooner.

Mr. Justice HARLAN.—At any rate he is called a Judge.

Sir CHARLES RUSSELL.—Yes. In my own justification I was going to say that I called him Judge because I found him called Judge. Perhaps it is because of his superior wisdom he has been so called by his friends and admirers. Let us assume that that is the understanding.

Sir JOHN THOMPSON.—We may start with the understanding that Port Townsend is not in Canada.

Sir CHARLES RUSSELL.—Yes, and that information is necessary for my learned friend Mr. Phelps, because he inquired the other day.

Mr. PHELPS.—Yes, I have since found out.

Sir CHARLES RUSSELL.—And I trust that the information we gave has been found accurate.

On the top of page 175 there is a good deal of abuse of the Lessees

in various points of the Islands with which I will not trouble you, and he says:

The seals begin to make their appearance in the region about Cape Flattery in the latter part of December or the first of January, varying with different seasons. When easterly winds prevail with much snow they keep well off shore, and do not make their appearance in great numbers before the middle of February or the first of March. Last winter was very mild, with but little snow, but the prevailing winds, which were south and south-west, were exceedingly violent, preventing sealing-schooners from doing much hunting. The mildness of temperature, however, with the direction of the prevailing winds, drove the seals toward the coast in incredible numbers. They gradually work up the coast toward Queen Charlotte Island, when the larger portion of the herds move along the Alaskan coast toward Unimak Pass and other western openings into Bering Sea. A portion of these seals, however, pass into Dixon's Entrance, north of Queen Charlotte Island, and into Cross
982 Sound and Cook's Inlet, and do not go to Behring Sea, but have their young on the innumerable islands, fiords, and bays in Southern Alaska and British Columbia. These seals are seen in these waters all summer, at the same time of the breeding on the rookeries of the Pribilof Islands, and are killed by Indians and the skins sold to dealers. The great body of the seals, however, do enter Behring Sea, where they are followed by the sealing-vessels. They usually take to the islands about the first of June, the breeding cows and bulls being earlier than the rest of the herd.

And on the other side, page 176 the third paragraph from the top:

Very little has been published about the migrations of the seals on the North Pacific coast before they enter the Bering Sea, and this point is one from which we got a lot of interesting matter. We have taken a good deal of evidence about the presence of seals at Cape Flattery, and have been told that they were more numerous last spring than they have ever been before..... I find a peculiar idea existing among those who claim to be authorities in regard to seals found in the waters of South America, especially about Tierra del Fuego and the Straits of Magellan. The notion that they are the same species of seal as those found in Behring Sea and the North Pacific is quite erroneous.

That is a different matter.

Mr. Justice HARLAN.—That is the language of Dr. Dawson.

Sir CHARLES RUSSELL.—Yes.

General FOSTER.—All of these are quotations.

Sir CHARLES RUSSELL.—No.

Mr. Justice HARLAN.—That which you read before is not a quotation.

General FOSTER.—It is from the London Weekly Times.

Mr. Justice HARLAN.—No, the end of the quotation from the newspaper stops before that.

Sir CHARLES RUSSELL.—Now I come to a paragraph I wish to read. I need hardly perhaps have troubled the Tribunal with the other:

These facts about the habits of the fur-seals of Cape Flattery, which I have known for more than thirty years, have this year been proved to be correct by the Royal scientists, and will seem to show there are always two sides to every question. While I join with all the sealers with whom I have conversed that there should be a close season on the Pribilof Islands, when no seals should be killed on those islands or in Behring Sea, I equally join with some of the more intelligent and observing of these sealers, that the hunting of seals along the coast of Washington, British Columbia and South-eastern Alaska does not in any way affect the seal catch on the Pribilof Islands, as there is every reason to assume that these coast seals never enter Behring Sea.

Thereupon he proceeds to give his views upon pelagic sealing, which is not the point I am now upon.

Then in the last paragraph but one, on page 177 he refers to what is certainly a remarkable fact if it is correct—I believe it is correct—that after the seals are skinned their dead bodies are left on the island, and are not turned to account for the purpose of extraction of oil.

Mr. Tupper is anxious that Mr. Swan's position should be vindicated, and he refers me to a communication which is in volume III of the

Appendix to the British Case; p. 191, I do not think I need trouble the Tribunal to refer to it. He is described as Assistant Collector, Port Townsend, Washington Territory. I am surprised that my
983 friends should attempt to disclaim him. It is a communication that is published in the records of the 50th Congress miscellaneous documents no 78 presented by Mr. Dolph on the 15th March 1887, and ordered to lay on the table and be printed by the United States; and this shows that he was previously employed to report, because in page 192 he says.

> In 1883 I was instructed by Professor Baird to investigate the habits of the fur-seals and to make a report thereon, which report may be found in the Bulletin of the United States Fish Commission, volume III, 1883, page 201.

So that he had some official position, and why my learned friends should think it right to disclaim him I do not know.

Now upon this question of property, I need not point out that if there be this intermingling, that if there be this interbreeding to however limited a degree, it makes the question of property in the individual seals a hopeless one, because the United States say, "These seals are the result of breeding upon the Pribilof Islands"; equally Russia might say, "They are the result of breeding upon the Commander Islands"; and when you get to a community and commingling and confusion of the two herds, and an intermingling or interbreeding of these two herds or families, whatever they are called,—to say there can be fixed, in point of law, a property in any one of that mixed and confused family is a proposition that is quite untenable.

Now, still in that same connection, a very curious fact comes out in the evidence of the British Commissioners, and I speak subject to contradiction and correction if I am wrong. I do not think it is in any way met or contradicted by the United States Commissioners. It is this—that the skins of the seals that come to land become almost immediately, or soon after they come to the land, in the condition known as "stagey"; that is to say, a condition in which their pelage is not in the best condition for the purpose of commerce, but that among the seals that are killed at sea by the pelagic sealers the number of stagey skins is exceedingly limited. This fact would seem to suggest that a change takes place periodically, probably annually, in the skins of each of these animals; yet when they remain almost continually in the water the change is more gradual and scarcely noticeable, whereas when they come to land and remain on the land, and are exposed to the effect of the atmosphere and sun for a considerable time, the stagey condition becomes more marked.

I will not stop to read them, but I would respectfully ask the Tribunal to note that in paragraphs 134, 281, 631 and 632 of the British Commissioners' Report the facts that I have adverted to are mentioned; and in Mr. Macoun's Report, to be found in the first volume of the British Counter Case, Appendix, at pages 145 and 139, the same result seems to have been noticed by him.

Now one other point. I have stated that as regards certain of the seals they do not return to the islands at all, until they come there for certain definite purposes in connection with the perpetuation of
984 their species: in other words, that there is no need for the young male seals to come there till they are a certain age; that some do come but a great many do not; that in the case of the female seal there is no need for her to come there until she comes under the influence of the sexual instinct. Now I want to show that that is a fact.

Senator MORGAN.—Before you approach that point, Sir Charles, I should like to make a suggestion. Counsel on both sides in this case seem to me to have neglected a very considerable and definite part of the evidence upon the subject of a necessity that nature has imposed on all seals, to land during some portion of the season for the purpose of undergoing this very process of shedding their hair. The evidence to my mind is convincing that that is just as much a necessity of the nature of the seal as the other instincts to which you refer; and that therefore it is that every seal is bound by a compulsion of nature to visit the shores during this stagey season, as they call it, when the coat is being shed. That impression having been made on my mind, I call attention to it merely for the purpose of inviting discussion.

Sir CHARLES RUSSELL.—With great deference, I am not surprised that my learned friends on the other side have not dwelt upon that. I think that view is not well founded. It does not appear to be so, and the evidence to which I have directed attention points in a different direction—that, though this stagey operation may be gone through in the case of each seal every year, yet it is not necessary for the seal to come to land. The probability is that the operation is more gradual in the case of those when they do not land than when they do—in other words, the evidence rather points to the fact that they have been on land than to the fact that they are going on land.

Senator MORGAN.—In order to get through with it—at all events it has made that impression on my mind, and especially that Report of Mr. Elliott to which you refer.

Sir CHARLES RUSSELL.—We will look at it again in view of the intimation that you have been good enough, Sir, to make.

In reference to this difficulty, which points to the impossibility, or impracticability, or both, of identification, all they say about it is on page 49 of their written Argument:

> The difficulty of identification may be suggested, but it does not exist. There is no commingling with the Russian herd. Every fur-seal on the North-West coast belongs indisputably to the Alaskan herd.

That is statement, but it is not proof. On page 232 they say:

> The marked differences between the Alaskan and the Russian seals are such as to be readily and plainly discernible to persons familiar with the two herds and their characteristics. This, once established, would naturally prove that there is no commingling of the respective herds.

We have shown by the evidence which I have read (which I can see no reason to doubt, though it is for the Tribunal to judge) that there is commingling.

985 I am now going to another point; namely the absence of these seals for a long period of their lives from the Islands. I refer to the evidence of Mr. Bryant in volume I of the Appendix to the British Counter Case, page 125. Mr. Bryant is a gentleman who has been employed by the United States before to report on this question; and, on page 125, we have put side by side a comparison of the statements made by this gentleman in his monograph of 1880, written at the instance of the United States Government, and the reports and evidence which he gave from 1869 to 1876.

Mr. Justice HARLAN.—Which side of that page do you refer to?

Sir CHARLES RUSSELL.—For this purpose, to both. He differs, you will see, as to the duration of the absence; but in each case he admits that it is for a long time.

In 1876 he said:

> About the 20th of July the great body of the previous year's pups arrive and occupy the slopes *with the younger class of* males, and they continue to be mixed

together during the remainder of the season. The 2-year-old females, which pair with the young males in the water near the island, also now associate with the other females.

At this stage they (the female pups) leave the island for the winter, and very few appear to return to the island until they are 3 years old, at which age they seek the males for sexual intercourse.

On the other hand, the males return the following year with the mature females.

Mr. Justice HARLAN.—Does that mean the young males?

Sir CHARLES RUSSELL.—I think it does.

But the young females, as already stated, are not seen in numbers until they are 3 years old, when they arrive in the height of the breeding season.

Then:

The masters and officers of these schooners (of the Alaska Commercial Company) who are familiar with the seals, say they see small groups of small (apparently 1 and 2 year old) seals at all times during July and August.

That means in the sea.

These, I think, may be young females, which, as already stated, do not visit the island till they are 3 years old.

Then the other statement that he made in his later Report was:

Returning again, this time as 2-year-old,——

This is the deposition which he makes in this case; therefore, he makes a curious contradiction there of one year,——

the males go upon the hauling-grounds with the bachelor seals, and the females land on the breeding rookeries. It is probable that the females of this age are fertilized by the bulls, and leave the islands in the fall pregnant.

On returning the third year the young male goes again upon the hauling-grounds, and the female to the rookeries, where she brings forth one pup.

Now, there is certainly a very remarkable difference in the two statements; the first statement is the earlier; the one on the left-hand side is that the female, after leaving as a pup a few months old, does not
986 come there except acting under the impulse of the sexual instinct and then she returns at three years of age; and, again returns the next year, as a 4-year old, to deliver her pup.

Mr. Justice HARLAN.—The phrase "2-year olds" refers to males.

Sir RICHARD WEBSTER.—I think to both.

Sir CHARLES RUSSELL.—Yes, it goes on to say:

It is probable that the females of this age, and so on.

Mr. Justice HARLAN.—The first sentence refers to males.

Sir CHARLES RUSSELL.—Yes; but to females in the next instance. He says:

Returning again, this time as 2-year-olds, the males go upon the hauling-grounds.

That is, of course, 2-year olds:

And the females, that is the females of the same age, land on the breeding rookeries. It is probable that the females of this age are fertilised by the bulls.

And so on.

Now finally in this connection, and still bearing on the question of property and the possibility of identification, you will recollect that my learned friends have again and again said that not merely do they return to the island upon which they were born and attach themselves to the land of their birth, but that they return to the same spot. We have luckily the means of testing this by experiments which their own witnesses depose to. This same Mr. Bryant went through the experiment of marking a certain number; the account of the experiments will be

found in the large volume of the British Appendix page 451. He states that he was an agent employed by the United States and had previously reported.

I find he states in his deposition, made for the purpose of the Case of the United States, that his experience in the Pribilof Islands extended from 1869 to 1877, so that he had considerable experience.

If you want to know more about his experience, I shall be able to give it to you but I do not think it is important enough. I was referring to page 451 of this last volume. I think it is the same experiment that was referred to by Mr. Elliott, and the paragraph to which I refer is about the middle of the page. He makes a citation from Mr. Elliott in which he says:

Mr. Elliott in fact himself writes on the same page (referring to the presence of a large sealing fleet in Behring Sea), that it could not fail in a few short years in so harassing and irritating the breeding seals as to cause their withdrawal from the Alaska rookeries and probably retreat to those of Russia, a source of undoubted Muscovite delight and emolument, and of corresponding loss and shame to us.

Mr. Justice HARLAN.—That is not Mr. Bryant's statement.

Sir CHARLES RUSSELL.—No I think I said he began by citing Mr. Elliott.

Mr. Justice HARLAN.—I mean to say that that document is not prepared by Mr. Bryant. It is prepared by Dr. Dawson as a memo-
987 randum on Mr. Blaine's letter to Sir Julian Pauncefote as you will see at page 436. All I meant to say was that that was not the statement of Mr. Bryant.

Sir CHARLES RUSSELL.—Quite so. I think you are right so far.

I thought it was and I think it will be found that it is in another form. If I have been mistaken in that I shall be very sorry.

I will read the print, however, as it stands.

His remark implies that the seals may resort to either the Pribilof or the Russian Islands, according to circumstances; and who is to judge, in the case of a particular animal, in which of these places it has been born? The old theory, that the seals returned each year to the same spot, has been amply disproved. Elliott himself admits this, and it is confirmed by Captain Charles Bryant, who resided eight years in the Pribilof Islands as Government Agent, and who, having marked 100 seals in 1870 on St. Paul Island, recognized the next year four of them in different rookeries on that island, and two on St. George Island.

Those two islands being some 30 miles apart. But I should like, as Mr. Justice Harlan has referred to it, to see exactly what Mr. Bryant says.

Mr. Justice HARLAN.—You will probably find it in Mr. Allen's book.

Sir CHARLES RUSSELL.—Perhaps that is what it is. I know I have satisfied myself that it was adopted by Mr. Bryant; but I think your observation is quite correct. I find that my reason for so stating it is that on page 129 of our Counter Case, after giving the Elliott experiments which I am now going to refer to, the observation is then made, the same or a very similar experiment is referred to by Captain Bryant, and I can prove that.

Lord HANNEN.—The passage seems to be referred to.

Sir CHARLES RUSSELL.—Yes, and I find also in the Congressional Report on the Fur-seal Fisheries of Alaska, Dr. H. H. McIntyre, who was referred to by my friend as a great authority, says the seals are found indiscriminately on the two islands; that is, seals born on St. George are found on St. Paul, and *vice versa*.

Now I wish to read this experiment of Mr. Elliott. His is the Census Report for 1880, which has been frequently referred to, published in 1881. The document is printed at the Government Printing office at

Washington, Department of the Interior, 10th census of the United States, Walker, superintendent, and so on. The paragraph to which I am referring is on page 31.

The first arrivals are not always the oldest bulls.

I will read this shortly.

Their method of landing is to come collectively to those breeding grounds, where they passed the prior season; but I am not able to say authoritatively, nor do I believe it, strongly as it has been urged by many careful men... that these animals come back to and take up the same position on their breeding grounds that they individually occupied when there last year. From my knowledge of their action and habit I should say very few, if any of them make such a selection and keep these places year after year.—

988 and so on. And he comes to the conclusion that they do not come to the same spot.

He proceeds:

It is entertaining to note in this connection, that the Russians themselves, with the object of testing this mooted query, during the later years of their possession of the Islands, drove up a number of young males from Lukannon, cut off their ears, and turned them out to sea again. The following season, when the droves came in from the hauling grounds to the slaughtering fields, quite a number of those cropped seals were in the drives, but instead of being found all at one place, the place from whence they were driven the year before, they were scattered examples of croppies from every point on the island. The same experiment was again made by our people in 1870 (the natives having told them of this prior undertaking) and they went also to Lukannon, drove up 100 young males, cut off their left ears, and set them free in turn. Of this number during the summer of 1872 when I was there, the natives found in their driving of 75,000 seals from the different hauling grounds of St. Paul up to the village killing grounds, two on Novatoshnah rookery, 10 miles north of Lukannon, and two or three from English bay and Tolstoi rookeries, 6 miles west by water; one or two were taken on St. George Island, 36 miles to the south-east, and not one from Lukannon was found among those that were driven from there; probably, had all the young males on the two islands this season been examined, the rest of the croppies that had returned from the perils of the deep, whence they sojourned during the winter, would have been distributed quite equally about the Pribilof hauling grounds. Although the natives say that they think the cutting off of the animal's ear gives the water such access to its head as to cause its death, yet I noticed that those examples which we had recognized by this auricular mutilation were normally fat and well developed. Their theory does not appeal to my belief, and it certainly requires confirmation.

Therefore, that experiment shews that this suggestion of attachment to a particular spot or even to a particular rookery, is not well-founded; that it does not exist even with regard to a particular Island, but that of those that were so marked on one Island some were found on another Island 36 miles away, and some were not found at all. What became of the rest? Who can tell? Their natural enemies, no doubt, could account for some of them; some may have intermingled with the Russian herd, and others gone elsewhere. Who can tell? No one. And all this difficulty and uncertainty of identification, the Tribunal cannot fail to see, has a most important bearing on the question of the claim to legal property in the individual seals. Let me illustrate what I mean; supposing, instead of both these Islands being in the possession of the United States, that the dividing line of territory, had been drawn between these Islands, and one was left in the possession of Russia and the other of the United States: would such a claim to property be possible then? Or, again, to take another case which throws a stronger light on this question of property. Supposing that instead of the United States being not merely the sovereign owners of the land, but also the owners of the *dominium utile*,—suppose, as is the case with the Scilly Islands on the south-west coast of England,

and as is the case with many Islands in the Gulf of St. Lawrance, and as is probably the case with many Islands off the coast of America, that the *dominium utile* was not in the Government but only the
989 "eminent domain",—that the *dominium utile* was in the man who lived on the Island,—let us see what would be the result of this. The argument for the United States must go the length of saying that the owner of those Islands could assert, against all the world, property in the individual seals frequenting those Islands and might assert the rignt to maintain that claim of property wherever those seals were to be found.

Again let me put a case which further illustrates what I conceive to be the untenable character of the position. Assume that the Islands are separately owned by two different owners; or separately leased, one to one lessee and one to another lessee; would it be possible to assert, even *inter se*, the right of property in individual seals found in Behring Sea, or anywhere out of Behring Sea, as belonging to one or other of the lessees of those Islands? If it be difficult, *inter se*, to regulate the rights and claims of property, it is still more difficult as regards third persons.

Now, all these considerations, each of them strong in itself, collectively, I submit, are very difficult to meet, and do something more than suggest the impossibility, as I submit, of affirming property in the seals on this initial difficulty of identification.

But those are not the only difficulties. Is there any one of the Tribunal who has any doubt that, taking the facts which are not in dispute as regards this animal, this amphibious animal, I have described an animal which the law has classed, has designated, an animal *feræ naturæ*. Is there any one who doubts it? There are undoubtedly three classes in this connection: The class of wild animals, the class of domestic animals, the class of animals which, while belonging to the class of wild animals, have been taken out of that class by reclamation, so that they have ceased to be wild: have become reclaimed, domesticated, and therefore are removed in law out of the category of wild animals. Now is it to be gravely said that seals are in the category of tame animals? What is the index to their being tame? How have the United States even professed to tame them? Have they alleged, can they truly allege, anything more than that which I have conceded to them from the beginning, that by reason of the incapacity and mildness of this animal to defend himself on land, he presents an easier task to the man who goes to knock him on the head with a club; and thereby gives to the United States or their lessees greater facilities for killing them? but except knocking them on the head, and preventing anybody else knocking them on the head, what do these gentlemen, or the representatives of this Government, do to take even the simplest step towards acquiring property in the animal on the ground of reclamation, or *per industriam*.

The alleged tameness of the seal considered.

One further remark before I come, as I suppose I must come, to the propositions, the vague and general propositions, my friends have advanced. It has been a matter of surprise to me that my learned friends have not addressed themselves to the consideration of the very first step which is to be taken before there can be an assertion of
990 property in any wild animal: that step is possession. You must first take the animal. They have on the islands tens of thousands, according to Mr. Elliott, millions, of seals. They drive large numbers of them under circumstances of great cruelty, if Mr. Elliott's account be true, for the purpose of selecting, knocking on the head, taking pos-

session of, a certain number. In that certain number their prope becomes absolute. They have killed them and taken possession of th just in the same way as the man who shoots a rabbit and puts it in pocket or in his hunting bag has taken possession of that rabbit; property is his, unless, according to English and according to Ameri law, he has shot it upon land in the character of a trespasser, in wh case he does not get the property even then—wherein the English mu ipal law and the American municipal law, as one of your body will you, differs from the civil law. According to the Roman law—which a little stronger illustration of the wild animal being no one's prope until possession is taken of it—according to the civil law, if I shoo rabbit upon another man's land, although I am committing a tresp on the land in the act of shooting, yet the property in that rabbit w be in me whereas according to English law the property would not in the trespasser, but would be in the owner of the land. The Fren law is the same, as I shall hereafter have the opportunity of showing the Tribunal.

I wish now to come—because I am not relieved from any part of t task—to a little closer examination of the position. If I am right saying that this animal originally is properly described as an ani *feræ naturæ*, it lies upon my learned friends to bring him out of t category, to show that he belongs to a different category as a reclai animal. I have ventured to suggest there is not a scintilla of evide to justify the claim of reclamation. The *onus* is upon my learned frie by some authority, upon some principle of law, to show that in such cumstances they have a claim to property in that animal on the high s or wherever it is outside their domain. I have pointed out they h not the property even when it is on the Island. They have the ri to kill it. They have the right to prevent anybody else killing it; that is not property. It is a mere right to kill; nothing more.

My learned friend is met with this difficulty: He asks himself question. By what law, in view of what law, am I to consider this q tion? and knowing, as he does, that the municipal law of Great Brit is the same as the municipal law of the United States, my learned fri says that this is not a matter to be determined by municipal law, b matter to be determined by international law. I dispute that prop tion. What has international law to do with it?

Am I not well founded in saying that by the municipal law of ev country in the world, the right to property in things must be made according to the municipal law of the place where the property is s ated, subject always to certain rules as to devolution, etc., with wh we are not now concerned, founded upon the principle that *mob*
991 *sequuntur personam.* They must have their right of title municipal law. Does the United States municipal law give t property? No. The legislation even of the United States has affected to give property. The United States legislation has proce upon the principle which I have so often adverted to, of the assert of territorial dominion over a given area, and the application of wh may call game laws to that area; but it has not in its Statutes nor any executive act, nor by lease, nor in any other mode, affected to cl for itself the property as such, nor to give to the lessees the property such. They give to the lessees no more than they had themselves right, namely, a license to kill within certain limits as to number.

Senator MORGAN.—I was about to inquire whether all game l were not predicated upon the ultimate ownership of the property in sovereign?

Sir CHARLES RUSSELL.—No, Sir; they are not. There are certain classes of animals, which unquestionably in ancient days—the subject is almost without interest in these times—the taking or killing of which were within the exclusive grant and right and franchise of the Sovereign—the sturgeon was a royal fish, the swan was a royal bird. These were the only exceptions that I can for the moment call to mind. There were certain other franchises which were supposed to be only within the power of the Sovereign to create, as for instance, a free warren, or a deer park; but these are, again, instances which have passed from the domain of practical importance.

But the game laws of different countries have nothing to do with the question of property in the wild animals. Their sole operation is that the hand of the slayer shall be stayed for a certain period of the year; that within the defined period called the "close time", he shall not be at liberty to exercise that right of killing which the law itself recognizes; but it does not touch, it does not affect in any way the question of property. The question of property, according to the law of every civilized country that I know of, depends upon the considerations of possession and dominion, upon the nature and habits of the animal, and upon the physical relations of man towards that animal.

Senator MORGAN.—I do not question that position as between individuals, but between the Crown and individuals I think it is otherwise.

Sir CHARLES RUSSELL.—Well, Sir, I am not aware of any authority which gives to the Sovereign any more exclusive right to kill wild birds than anybody else, or to interfere with anybody else killing them. Indeed I may remind Senator Morgan that the term that is used to describe wild animals with reference to the rights of others is borrowed from the civil law. They are described as *res nullius*, and therefore a thing which any one may capture, a thing which the man who first possesses and captures may acquire the property in. The authorities which I shall presently refer to I think will make that clear.

992 There is one other preliminary word I should like to say; and it may have some bearing upon what Senator Morgan has been good enough to ask. I think that perhaps what the learned Senator may have in his mind is a historical recollection of a state of things which has long passed away, which relates back to the time when the feudal system existed and when—and the learned President will recognize the illustration I am giving in reference to the state of things in France before the Revolution—when no one below a certain degree or status had a right to indulge in these sports, which were reserved to what was then supposed to be the better part of mankind; and when these privileges of hunting, shooting, etc., had to be acquired by authority from the sovereign—a state of things which has long passed away, both in this and most countries, and in England: but it has nothing whatever to do with, does not touch in the faintest degree, the question of property.

I must notice, before I proceed, a suggestion, I did not really conceive it to be much more than a suggestion, that this question of property was to be judged differently from the mode in which it would be judged if it were a claim by a private owner of the Pribilof Islands to the property in himself; in other words that the question of property assumes a different character—I do not know that I am well founded in saying that this distinction was made—but that the question of property assumes a different character, is a different thing, is to be tested by different principles, when the claim to the property is put forward in the name of the

United States. If that is so—I do not know really whether it is mea to be so or not—I say there is no such distinction to be made. For wh would be the result? You would be called upon to say that if the P bilof Islands were owned by a private owner, and that he was the p son who was here formulating the complaint of interference with l rights of private property, his cause being taken up by his Governme and presented to this Tribunal, you would be obliged to affirm—if I : right in my argument so far—that he had no property; but that if 1 United States is the owner of the Islands, and merely leases them to 1 lessees, a different set of considerations apply, and that that collect idea, that legal entity, the Government of the United States, may ha property although the private individual could not. I say there is warrant in law for the attempt to draw the distinction. Governmer may own property just as individuals do; but their right to that pro erty depends upon the same principles and the same considerations possession and dominion which are vital to the question of property an individual. If there be any doubt in the minds of the Tribunal up that point, I will endeavour to elaborate it a little later in my argumen

That being the position of things, and my learned friend having cit authorities in his written Argument which disprove his case, as I ho to satisfy the Tribunal, and having been obliged to admit that he cann found any title based upon the municipal law of his own country, or t municipal law of England, or the municipal law of any civiliz

993 country in the world, what does my learned friend do? He has-

I say it with all deference to him, because he has made the be of a difficult position—he has in the absence of definite authority be obliged to indulge in treacherous generalities; he has been obliged accept the theories of metaphysical writers as to what they think t law ought to be instead of what the law is. He has floated abo amongst the clouds, and he has made very eloquent appeals, very el quent appeals indeed, to the eternal and immutable principles of justi and humanity. I am reminded of an aphorism, attributed to the la Lord Brougham, who is reported to have said on one occasion when l heard an advocate make an eloquent appeal to the immutable principl of nature and of justice, that he felt quite certain that advocate h very little law on his side.

A similar expression of opinion, I think not without its significanc was also attributed to another distinguished judge, Lord Ellenbroug On one occasion, an advocate almost as eloquent as my learned friend Mr. Carter and Mr. Coudert, was making these appeals, and among other authorities he referred to the great Book of Nature.

"What are your authorities?" said Lord Ellenbrough. "My Lor the Book of Nature". "What page, and what edition?" said the learn Judge.

The orator was obliged to descend a little rapidly to the dull level prose.

Now, what are these propositions of my learned friend; because suppose I must examine them. We have had a disquisition upon t institution of property, and as to its foundations. We have been tol and I was rather startled at the suggestion, that property existed an rior to human society, and that one of the great objects of the inve tion of society was the preservation of property. That will be fou at page 366 of the report. Therein my learned friend, I think, put t cart before the horse. "Subjects of property existed anterior to so ety, but there was no property in the legal sense of that term, un

society." Then my learned friend said, on page 393, that individual ownership was an invention of society, from which it would appear to follow that community of property had existed previous to society; and finally he said that "property sprang from the necessity of peace and of order."

I quite agree; but when Adam walked out of the Garden of Eden, there was no need of a policeman to keep order, and property grew because the needs of society required that property should grow. Property grew because of that desire, inherent in the human breast, for peace, for order, for convenience, for the avoidance of disturbance; and as society grew, even in its earliest and rudest stage, a certain moral opinion grew with it, which gradually, at first in very small matters, afterwards in much wider matters, grew to a recognition of a special or exclusive right of user of particular things. But when my learned friend in this connection goes on further to appeal to the law of nature, I merely have to ask the Tribunal, what has the law of nature to do with it? The law of nature, I suppose, means the natural law, or
994 the law in a natural state of society. Well, the law, so far as there could be said to be law in a natural state of society, was that a man got what he conceived to be necessary for his wants, and stuck to it, as far as he was able to stick to it. I say it would be much truer to say since my learned friend is relying upon the law of nature to support his argument—it would be much truer to say that law in its development, has not been based on the law of nature, but is in restraint of the law of nature, which had for its sanction force, and force only.

But these propositions, while interesting to discuss, seem to me very wide of the questions which we are here engaged upon; and I shall be very glad, if, as the interval of adjournment has been a little longer than usual, I might be allowed to go on a little further with this question of property.

The PRESIDENT.—Certainly.

Sir CHARLES RUSSELL.—My learned friend, in his argument, stated two propositions, one of which I admit to be substantially right, the other of which I submit is radically wrong; and yet my learned friend has put them together, and has said that they were in effect the same proposition. I think it would not be a waste of time if the Tribunal would allow me to read these two propositions without comment. In the first instance, on page 379 of the print of my learned friend's argument, he says:

Mr. Carter's two propositions as to property in wild animals examined.

> Now from all those authorities, drawn from the municipal law of many different nations, confirmed by the ancient Roman law, these propositions are exceedingly clear, that—

This is his first proposition:

> In reference to wild animals, if by the art and industry of man, they may be made to return to a particular place to such an extent that the possessor of that place has a power and control over them which enables him to deal with them as if they were domestic animals, they are in law likened to domestic animals, and are made property just as much as if they were domestic animals.

That proposition is, I admit, substantially correct. Then he goes on, a little farther down:

> And you may state another proposition fully substantiated by these authorities. It is scarcely another proposition; it is almost the same thing, but the language is in a different form.

Here is the next proposition which is said to be the same as the first. I agree substantially with the first, but respectfully differ with the second:

That whenever man is capable of establishing a husbandry in respect of an animal commonly designated as wild, such a husbandry as is established in reference to domestic animals, so that it can take the increase of the animals, and devote it to the public benefit by furnishing it to the markets of the world, in such cases the animal, although commonly designated as wild, is the subject of property, and remains the property of that person as long as the animal is in the habit of voluntarily subjecting himself to the custody and control of that person.

995 You observe the propositions are essentially different. In the first, he correctly states the foundation upon which the claim of reclamation, or, in other words, the claim *per industriam*, is based: namely, that by the art and industry of man, the wild animals are made to return to a particular place, so that they can be dealt with, etc.

But in the next proposition it is said that "whenever a man is capable of establishing a husbandry in respect of an animal commonly designated as wild, so that he can take the increase", etc., that equally gives him the property.

Now, let me test these two propositions. If the latter proposition is true, it is true also that the owner who rears pheasants on his estate is the absolute owner of them. So as to rabbits; so as to wild deer, unenclosed; so as to grouse. Now let me call attention to the fact how much stronger the case as to pheasants, grouse, rabbits, deer, is. In the case of the pheasants I have already stated what is done in the way of rearing them. I have already stated what is done in the way of feeding them. I have already stated what is done in the way of preserving them from attacks from outside by means of gamekeepers and others. If this proposition is true, then the owner of the pheasantry who kills his game, as he may do, for the purpose of supplying the market, and so establishing an industry or a husbandry, and who can discriminate the sexes, because he can shoot only his cock pheasants,—he too has a property, forsooth, in the industry, and in the cock pheasants and in the hen pheasants, and he may deny the right which the law, as I have said, of every municipal country now gives to everybody, the right of killing these animals when they are outside the land of the particular owner of that pheasantry.

So in the case of rabbits. A man may establish an industry in a rabbit warren. So in the case of grouse. A man may only kill his cock birds. So in the case of wild deer, in an unenclosed park; he may only kill his bucks. This argument would land my learned friend, therefore, in the proposition that as regards all these animals, which are admittedly of the class of animals *feræ naturæ*, which are admittedly not domesticated, but which are "cherished" in a higher sense than the seals are cherished, for they are fed and induced to come back to this place—all these animals would become the subjects of private property.

We have had a frequent reference to the general principles embodied in the phrase "*Sic utere tuo ut alienum non lædas.*" That maxim carries you no further. You have to define what is yours and what is mine. You have to define what is injury and what is not injury. You are all in the vague; you are all in the general. These general maxims tell you nothing. By merely saying "*Sic utere tuo ut alienum non lædas,*" you do not carry your proposition one whit farther, nor help the Judge who is to decide the question.

Then we come to another proposition, to which great significance was attached—a proposition which, so far as I could see, had been invented

by my learned friend as a kind of formula for the purpose of
996 meeting the case of the fur-seals. It was this: That only the usufruct of property is recognized by law, and that there is no right exercisable in respect of wild animals, generally speaking, (because he said there were some which were quite inexhaustible, and therefore people might in that case do what they pleased), unless in the exercise of your right you take only the superfluous males, and in that way do not interfere with the stock.

Mr. CARTER.—I made no such argument.

Sir CHARLES RUSSELL.—Oh, really, Mr. Carter, did you not maintain that? If not, I of course withdraw it.

Lord HANNEN.—What page and what edition?

Sir CHARLES RUSSELL.—I am afraid I shall have to give you a good many pages. But I will come to it to-morrow morning and justify myself by reference to the actual pages. I certainly wish to make this quite clear before I go away to-night. Did not my learned friend say that he was affirming only a right of usufruct of property, and that there was no such thing as absolute property?

Mr. CARTER.—I said by the law of nature that was all that was given to man.

Sir CHARLES RUSSELL.—But the law of nature is the same thing as international law, according to my friends, and it is international law that he is here invoking.

Mr. CARTER.—If you are determined not to understand my argument I cannot help it.

Sir CHARLES RUSSELL.—I assure you I am not in that position at all. I really am not; but to avoid any discussion, I will pass that.

Mr. CARTER.—I will not interrupt you again.

Sir CHARLES RUSSELL.—Not at all; it is not the least interruption in the world. I will pass that as a disputed proposition, and I will come to it to-morrow morning and read the pages.

One topic I can deal with, I think, without any risk of being interrupted. My learned friends have expended a great deal of their eloquence in the printed argument, and in the oral argument, upon the wasteful character of pelagic sealing. They have denounced it as a crime, a moral wrong, an indefensible wrong, and have used various other strong epithets. And now I want to ask, and I expect that an attempt will be made to answer it at some later stage. What is the relevance of that argument to the case of the United States? Is it because the mode pursued by the Canadian sealers in killing seals is wasteful that they have no right: but that the United States have a right, an exclusive right, because their method is not wasteful? I want to know. Does their right depend upon, or is it stronger or weaker according to whether our mode of killing is wasteful or not wasteful? In other words, if we could discriminate while shooting at sea, between the males and females, if we could only shoot barren females, if we could only shoot young males, do they admit we have the right to shoot
997 them? Do they, if we have the means of shooting them in a manner, to use their formula, which is not wasteful, do they admit we have the right to shoot them?

Wastefulness of pelagic killing irrelevant to decision of the question of property.

The PRESIDENT.—That argument would perhaps affect rather the question of regulations.

Sir CHARLES RUSSELL.—You are anticipating exactly the point to which I am coming. But it is used in relation to property.

The PRESIDENT.—The other side have argued both questions at the same time, in one argument.

Sir CHARLES RUSSELL.—I quite agree, sir; but they have mi them up. They have not only argued them at the same time, but in mingled them. This was put distinctly forward as a consideratio support of the argument on property. I want to know, is it to be rel upon or not. It must be obvious—as you, Sir, with your acuten have already perceived—that it can have no bearing upon the quest of property. If we have a right to do a thing, the fact that we d in a wasteful way cannot change a right into a wrong. The fact t we do it in a wasteful way cannot give them a right which they otl wise would not have.

I dwell upon this, however, for this reason, that I want to show you satisfy you, that while this question of wastefulness of pelagic sealin most appropriate to be considered in relation to the question of re lations, it must be discarded from the consideration of the questio property, and ought not to have been introduced into the considerat of the question of property, where it has no legitimate place, wher could only be used for the illegitimate purpose, not of aiding the ju ment of the Tribunal, but of prejudicing it and distracting it.

Mr. Justice HARLAN.—Does it not bear on the question of the ri to protect the industry at the island?

Sir CHARLES RUSSELL.—I am coming to the question of indu presently. I was dealing with the question of property either in industry or in the seals. I would ask that question again, as Ju Harlan has been good enough to put it. Is it alleged that the righ protection of their industry depends upon whether we kill wastef or not? I should like an answer to that. Is it to be alleged that right to protection of the industry is strengthened or depends in slightest degree upon the question whether we kill wastefully or

Mr. Justice HARLAN.—If the killing at sea is calculated to des the industry, it would seem to have some bearing on the questio protection, if that right to protect exists.

Sir CHARLES RUSSELL.—"If". "There is much virtue in an '

Mr. Justice HARLAN.—I am making a distinction between a question of property in the seals or in the herd, and the questic the right to protect the industry on the islands.

Sir CHARLES RUSSELL.—You mean the proposition which my lea friend, Mr. Phelps, advances in his argument, that even if there i property in the seal, and no property in the herd, yet there may right to protect the industry. That I will come to in a mon

998 Mr. Justice HARLAN.—Mr. Carter covered that ground, question of protection, before he got to regulations.

Sir CHARLES RUSSELL.—Yes.

Mr. Justice HARLAN.—You are saying that on the question of p erty simply, the discussion as to the wasteful character of pelagic ing was irrelevant. I simply inquired whether, independently of question of regulations, and independently of the question of prop the wastefulness of pelagic sealing would not bear on the questic the protection of the industry at the islands.

Sir CHARLES RUSSELL.—Oh, independent of any question of prope

Mr. Justice HARLAN.—In the seals.

Sir CHARLES RUSSELL.—That pelagic sealing may injure the indu on the islands, if it be so called, nobody doubts. That is not the q tion we are discussing; but I say that in respect to any right of tection of an industry, or in respect to any right of protection of seal or of the herd, the question of the wastefulness of the means nothing whatever to do with it, and cannot give them a right which t *have not got* without it, or put us in the wrong if we are in the rigl

The learned President has said, what is quite, I think, the accurate truth of the matter: it cannot be invoked to give a title to the United States or to their lessees which they have not otherwise got. It is material—most material—when you come to the question of regulations.

The PRESIDENT.—Sir Charles, I must observe that there is a protection of an industry which is often called property today: what we call in French "propriété industrielle", that is, a sort of qualified property. It is a sort of right which in my personal opinion is wrongly called property, but it is so called, however, in the current use of the language of all nations to-day, and Treaties have been made between nations to protect that property. As it is a certain artificial construction of law it may be relevant to plead that it is more or less worthy of protection, according to the more or less degree of morality which resides in it.

Sir CHARLES RUSSELL.—Could you give a concrete illustration, sir, of that law?

The PRESIDENT.—For instance, the right of authors, copyright. That is styled "propriété literaire" in our Treaties. That is not property, in my personal view, but it is commonly called property in international language. That of course is a sort of qualified right, which may be more or less extended and which, in fact, has been more or less extended, I mean, to justify the introduction of the argument of the other side, as to the moral character of the right which is protected, or in respect of which protection is invoked. I do not argue the case now, of course.

Sir CHARLES RUSSELL.—If there is a right there is a right.

Lord HANNEN.—I understand that you are contending now, that the need of the protection to make the thing valuable, does not establish that there is a right to it that protection.

999 Sir CHARLES RUSSELL.—No; I tried to say so, and I think I succeeded in saying so more than once, and I applied this to the right to the industry just as to the fur-seal.

May I say, Sir, as you have introduced the question of copyright, there is no such thing as the recognition internationally of copy right or of patent right except by Treaty. There is no such thing, and there is no country in the world that knows that better than America, because it is only very late in the day indeed that it has come into any arrangement with Great Britain of a protective character of that kind. On the other hand I may point out according to the opinion of distinguished lawyers in England, so far as municipal property is concerned, the statutes which protect copyright are but an affirmance of a principle which is a principle of the common law.

The PRESIDENT.—I understand the argument of the other side to go some what to the same extent as regards the protection of an industry. They want the industry protected as others want copy-right.

Sir CHARLES RUSSELL.—I will come to that presently.

The PRESIDENT.—I think Mr. Justice Harlan was speaking of an industry.

Sir CHARLES RUSSELL.—He was, but I was following the line of property in the fur-seal or herd of the fur-seal, and I will come, in due course, to the question of the industry itself, and what a right in an industry, in point of law, means. That is not the point I was at that moment upon.

The PRESIDENT.—Then perhaps we had better come to that to-morrow.

[Adjourned till to-morrow at 11.30.]

TWENTY-SIXTH DAY, MAY 24TH, 1893.

Sir CHARLES RUSSELL.—Mr. President, yesterday when I was referring to the report of Mr. Elliott upon a point which I conceived affected the consideration of the question of property in seals, I referred to him as a man who was vouched by the United States as a great authority on the seal question, and my learned friend Mr. Carter very properly challenged me upon that and asked me where he was so vouched. I had not the reference at the moment at hand, but I promised that I would refer to it this morning. As early in the discussion as the 4th April, which seems now a long way back, at page 13 of the printed Report I referred to those authorities in a passage which runs thus:

> Mr. Elliott is a gentleman who in the diplomatic correspondence leading up to this Treaty has been vouched by successive Ministers of the United States as an authority without any equal. Mr. Bayard, when he was Secretary of the United States, writing upon the 7th of February, 1888, describes Mr. Elliott as "a well known authority on seal life". That communication is to be found in the United States Appendix to their Case, and I can give my friends the reference, if they have not it at hand. Later, on the 1st of March, Mr. Blaine, who was then Secretary of State in America, on that date quotes Mr. Elliott again, in similar language, as an important authority on seal life: and finally on the 3rd of July 1890, Mr. Goff, Treasury Agent to the United States, cites Mr. Elliott in this language: He says: "There is but one authority on the subject of seal life", and he refers to Mr. Elliott as that one authority.

That therefore is my justification for the reference which I yesterday made. I have only to say in addition that this gentleman was, by a special statute of Congress of the United States, appointed in the year 1890 for the purpose of making the very examination which resulted in the Report from which I yesterday made certain extracts. At this stage of the discussion, and in this connection, I say no more upon the subject.

There are one or two points to which I wish to refer in order to clear up, possibly, a lingering doubt which may remain in the mind of Senator Morgan, as to the question he put to me as to the paramount right of a State in relation to property. I referred yesterday, and I think with correctness, to the law of France and the law of England in ancient days, founded on the feudal principle, as to grants of hunting and so forth, being in the nature of royal franchises; up to a certain period in the history of both countries, these franchises were only conceded to persons of a certain status. But I have since been thinking that the learned Senator had in his mind the idea expressed by the words "eminent domain": if any doubt remains that that has no connection
1001 with the question of property which we are here considering, I would wish to clear it up. I can best illustrate that by giving a concrete illustration of the law of eminent domain. Assume that the owner of a given estate dies without heirs: by right of eminent domain that estate would go to the Crown, according to the English law, but it would go to the Crown with just the same rights and no more than the original owner of the estate possessed; and applying it to the concrete subject which we are here discussing namely, the question of

:s as to wild animals that might be upon the estate, the rights would recisely the same as those possessed by the previous owner.—The ; *ratione soli* to kill the wild animals when on his land, the cesser hat right when off his land, and the right of any persons who it then capture them to take them according to the general law. efore, this right of the Crown does not in any sense touch the tion which we are engaged in discussing.

nator MORGAN.—It was not the right of eminent domain that I in my mind, but it was the power of the sovereign Government of y nation to control any property within its territorial limits if it is *ullius.*

·CHARLES RUSSELL.—That is undoubtedly the power of the State in its own territory—it can pass any laws it pleases. That is ubted. That is a proposition of constitutional law which cannot gued.—It has, undoubtedly, a perfect right to make any laws it es within the limits of its territorial jurisdiction, in relation to the erty within that jurisdiction.

nator MORGAN.—And can therefore assume ownership or pro-or-ship over property that is *res nullius.*

·CHARLES RUSSELL.—Certainly, if it so chooses, and I think I am ; in saying that by the law of, at least, one country, the law of ia, there is no such thing as *res nullius:* for that which is not opriated to private ownership is by the law of Russia regarded as e ownership of the Crown.

nator MORGAN.—I thought it was the law of Great Britain as well, . am mistaken in that.

·CHARLES RUSSELL.—Yes, I think so, Sir. I think I have stated rectly. I do not wish to recur to my argument which related to onditions necessary to constitute property in wild animals, but I to emphasize a point which I am afraid I did not emphasize suffi-ly—that there is no such thing as absolute property in wild animals. iout recurring to the conditions which affect the acquirement of erty in wild animals I wish to emphasize this point, that even in ase of animals that are reclaimed, there is no absolute property: roperty that is created by reclamation ceases if the animal resumes ild habits and escapes at large, the *animus revertendi* disappears. iat even in the case of reclaimed animals there is no such thing as lute or perfect property.

When I was upon the point that the manner in which seals were killed by pelagic sealers could not be the foundation of, or even a buttress for the right of those on the Islands, I failed to e one point. If that is admitted, then, of course, as I said yester-all this discussion, so far as it relates to property—but not to Reg-ons, for I agree it then becomes relevant—may be disregarded as re matter of prejudice; but I failed to point out what must follow that.

it is admitted to be irrelevant, as I contend it must be admitted on uestion of property, then it must necessarily follow that the United es will be driven to say that they are asserting upon the sea a right rior to ours, even if we kill by pelagic sealing only barren females ld, or superfluous males; even if we can kill non-wastefully, omically and discriminately. That follows inevitably.

ow, I also desire to give in this connection an illustration of the tion as to property and as to the right to pelagic sealing by, not an l case, but by the case as we know it exists. I will put it, in the instance, as if it were an ideal case. Assume pelagic sealing to be

pursued for a century, and the island on which the seals breed to be undiscovered: can it be doubted that, in that state of things, there is a right to kill the seals in the manner called pelagic hunting? Can it be doubted? Then, if, at the end of a century, the island on which those seals breed, is discovered, does that which for a century was a right which all the world might exercise, cease to be a right, and does the mere fact that you have discovered the breeding place on those islands change that which was exercised by mankind in common as a right into a moral crime, an indefensible wrong, and all the rest of it!

Now, I say this is no ideal case; this is the actual case you are discussing, because it stands confessed that, till the year 1786, the Pribilof Islands were unknown, and it was in that year, for the first time, that it was discovered that they were a breeding place for seals. That is the statement of my learned friend, and the correct statement, so far as I know, historically. Up to that time all who had an interest to engage in this pursuit, namely the aboriginal inhabitants along the coasts, engaged in it; and is it to be said, can it be said, with any show of reason or justice, or with any warrant of law, that straight away the discovery of the breeding place of the seals deprived those who previously exercised the rights of pelagic sealing, or the industry of pelagic sealing, of those rights?

Now, I proceed with the main line of the argument at the point where I left off, and I had been stating (I had not got very far in stating it) when my learned friend, Mr. Carter, interrupted me (I am not making any complaint of the interruption at all): he did not recognize the proposition which I was stating in order to combat it as one which he had advanced. I had not got, at the moment of his interposition, to the full statement of it; but I will cite it now, and will endeavour to show that I am justified in stating it as a proposition advanced by my learned friend and which I have to meet. I will state the proposition in two ways, because I find it stated with some variations. One
1003 is that only the usufruct of property is recognized by law; and that, with the exception of a certain class of living creatures said to be inexhaustible, you can only take the superfluous males, and that you can exercise your right of usufruct only in such a way as not to interfere with the stock. And, in another place the proposition is stated in very much the same way, but in slightly different language;—that property in animals useful to mankind, exhaustible in their nature, is by law given to him who can best utilize such animals for the benefit of mankind by taking the increase and preserving the stock. I do not think that my learned friend will quarrel with that as being a pretty accurate statement of the propositions which he advanced?

Mr. CARTER.—The last is accurate; the first is ambiguous.

Sir CHARLES RUSSELL.—I do not think it is ambiguous; but, however, he accepts the last as accurate.

Now, I should like to refer to the way this is illustrated in the argument of my learned friend, because I think I shall satisfy the Tribunal that he has here got out of the domain of law and into the domain of ethics,—that he has been relying upon the opinions of writers who have either been dealing with what the law ought to be, and the ethical principles which ought to permeate law and upon which it ought to be based; or he has got to metaphysical writers who have been struggling to find a metaphysical reason to account for the law, and who are not content to accept the law as it is.

Before I read these passages of my learned friend, I should like to make one preliminary observation. You observe the point of this

proposition is that you are not to kill females; that you are to take the increase of males; that you are not to do anything which will diminish the birth-rate of the particular class of animals with which you are dealing.

Now, I want to know where has any municipal law of any country, except the special Statute of the United States in relation to female seals, prohibited the killing of females:—any municipal law, to begin with? I do not know of any. I know of no system of municipal law which lays down any such rule. I do know that, both in hunting and shooting, owners of land do exercise a certain discrimination in preserving a certain proportion of females; but whoever suggested that it would be wrong to kill a doe, or that it would be wrong to kill a hen-pheasant, or a hind, or wrong to kill any but cock-grouse or cock-pheasants?

There is no such principle that I know of to be found in any municipal law. Is there any such principle to be found in international law? Has international law ever affirmed in any shape or form the proposition that there was something intrinsically wrong, morally wrong, or criminal, in the fact of killing a female in any species of animal to be found anywhere on the face of the earth? I know of none.

Senator MORGAN.—I think all the game laws applicable to what we call terrestrial animals—birds and deer and the like—have very
1004 distinct reference to protecting the breeding season or nesting season. I suppose that is for the purpose of protecting the females that they may rear their young.

Sir CHARLES RUSSELL.—I quite agree; undoubtedly, that is the object of a close season—not to interfere with the process of nature in producing their young; but there is no question of property involved; it is a question of municipal regulations. What I am now dealing with is this appeal to law—either municipal or international law—and herein I do not find any principle which treats it as a crime or a wrong to kill a female.

I want to follow this reference of my learned friend a little more. At page 58 of the printed Argument this point of usufruct is developed, and the whole argument at this point is addressed to ownership not being absolute. He is asking what is the extent of the dominion which is given by the law of nature to the owner of property. He there says.

> In the common apprehension the title of the possessor is absolute, and enables him to deal with his property as he pleases, and even, if he pleases, to destroy it. This notion, sufficiently accurate for most of the common purposes of life, and for all controversies between man and man, is very far from being true. No one, indeed, would assert that he had a *moral* right to waste or destroy any useful thing; but this limitation of power is, perhaps, commonly viewed as a mere moral or religious precept—

So far I have nothing to say against it. We are in the region of moral law: we are in the region of ethics, and I have nothing more to say.

> for the violation of which man is responsible only to his Maker, and of which human law takes no notice.

That, he says, is the common notion, but he goes on in the next sentence to say that it is a mistaken notion.

> The truth is far otherwise. This precept is the basis of much municipal law, and has a widely-reaching operation in international jurisprudence.

Thus he immediately slips away from the domain of ethics, and he affirms that, though the common idea is that this is a merely moral law,

as to which I agree, yet he apparently goes on to say it is a mistake to suppose it is not also law in the strict sense of that term. Then he puts this question of usufruct, and, in the second paragraph he says:

> No possessor of property, whether an individual man, or a nation, has an absolute title to it. His title is coupled with a trust for the benefit of mankind.

That is his first proposition.

> Second. The title is further limited. The things themselves are not given him, but only the *usufruct* or *increase*. He is but the custodian of the stock, or principal thing, holding it in trust for the present and future generations of man.

That may be all very well as a question of ethics. It is not law. I apply it to a concrete illustration straight away, to one indeed which is put by my learned friends themselves in argument; it shows how little faith they have in these vague general propositions. I
1005 affirm, as my learned friends have affirmed, that the United States would have a right if they chose—a right in point of law, and no one could complain of their doing it except as an offence against the moral opinion of the world, if indeed it were such,—they would have a right to knock on the head every seal that came to the Islands; and my learned friends have claimed it, for they have, I will not say threatened, but suggested it to the Tribunal as a thing to weigh with it in arriving at its decision.

Mr. CARTER.—We have not asserted that right.

Sir CHARLES RUSSELL.—I assure you I am well founded in what I say. If I am challenged on that, I will refer to the passage to-morrow morning.

The PRESIDENT.—Mr. Carter says it was not an assertion of right. He has not asserted that right, but you are to take it as a hint.

Sir CHARLES RUSSELL.—What is it if it is not an assertion?

The PRESIDENT.—Call it a hint.

Sir CHARLES RUSSELL.—Very well, I will call it a hint. I certainly understood him to say—and he was well within his legal rights in saying it—that if this Tribunal did not help the United States to protect the seals for the benefit of mankind, so that the blessings of Providence might, through the agency of the United States, be distributed to mankind, that they would have the right, I think he went even further than that and said they would be justified—which is a wider word than right, for it would embrace moral considerations also—in knocking every seal on the head.

Now one other passage. At page 67 of the Argument, enlarging upon this topic and still upon the question of right to the usufruct merely, he says:

> There are some exceptions, rather apparent than real, to the law which confines each generation to the increase or usufruct of the earth.

Mark the words he uses. And then he proceeds to give these exceptions: minerals, wild birds, and fish of the sea, which he describes as inexhaustible and outside this rule of usufruct. As regards that statement, I think it will be found that there is no such thing as any inexhaustible treasure of the earth or the sea; certainly in the case of fish it has been found, in the experience of many countries, necessary to restock the rivers and to try and replace various kinds of fish which have been exhausted.

Examination of assertion that there is only a right to the usufruct of property.

Now I say, so far, that I have justified myself; but my friend carries, quite logically, his argument still further; and from individuals

ıtricted to usufruct (which I say is not the law), he passes on to the
estion of what nations may do with regard to their property or their
ssessions; and in the printed report of his argument, at page 399,
friend shows he is quite consistent, because he proceeds to lay down
eries of extraordinary propositions to this effect: That if a partic-
ır nation produces a particular commodity the rest of the world can,
as of right, compel that nation to part with its commodity for
16 the benefit of the world. He instanced the case of india-rubber;
he instanced the case of tea. Why not instance the case of
rdeaux wine, or any other wine, or any other commodity? He says
n that if the interests of a particular nation will not prompt it (as
course it will), to exchange its commodities for other commodities of
world, yet as a matter of international right, as a matter of law, a
ong nation can take a weak nation, so to speak, by the throat, and
npel it to sell its tea, compel it to sell its india-rubber, compel it to
l its wine; the argument I venture to think being a good deal dam-
d, when my friend felt compelled (in answer to a question addressed
him by one member of the Tribunal), to admit so much at least as
s—that the nation which produced the particular commodity could
its own price. My learned friend admitted it could fix its own price,
t he put a qualification on that—"so long as it is not prohibitory".
ho is to be the judge of whether it is prohibitory or not? All this,
ay, is enough to show the Tribunal that my learned friend is in all
s discussion arguing as a great thinker, adopting the thoughts of
at thinkers on ethical and metaphysical subjects, and applying
ics and metaphysics to law. He is not, at least I cannot imagine
t he is, arguing as a lawyer to lawyers—as a judge to judges: he
in an atmosphere, and at a point of elevation, quite beyond my
ch, or even, I will add, beyond the necessity of my even making
attempt to reach him except in the way I am now doing.

Now I say with reference to each of these propositions—I care not in
at form they are stated, that they cannot be accepted merely because
friend is able to cite vague passages of theoretical writers, not
ling as I have said, with the matter, as lawyers, which would give
ne kind of colour, economically if you like, ethically if you like, to
se views. I am addressing a Tribunal called upon to declare legal
hts—that is common ground between us; and to support that posi-
n, therefore, my friend is bound to produce authority of lawyers, of
lges, or to show (if he thinks that international law has any applica-
n to the subject matter), that international law has either laid down
principle within which his contention clearly falls, or has adopted a
ncrete rule applicable to this case. I say he has done neither the
e nor the other; and if one comes to the basis of his argument, one
ls to see why, if there be any principle in it at all, it is to be confined
one class of animals. Why is it to be confined to animals at all? If
ufruct only of property is to be allowed, why may a man eat up all
s capital?

I presume my friend will not deny that there is no law which compels
man merely to live upon the usufruct of his capital estate—that
ere is no law which compels him to live only upon the interest of his
vested money—that he may eat up his capital if he pleases; and yet
y friend's argument, and the authorities he cites, show that he is
nbracing within this comprehensive principle even the case I am put-
ting, for he cites economic writers to show that abstinence, or
107 self restraint, or frugality—abstinence from spending is the
defence which these ethical writers make for the accumulation
capital.

Now, Mr. President, I cannot think that this helps us very much, nor, so far as this particular case is concerned, do I see that it helps us at all. Suppose there are three persons or nations who are interested—to take the concrete case of pelagic sealing—three nations, the American, the Russian and the Canadian people: suppose further that the home of the seals is still undiscovered; that they are only known to frequent these seas at particular times of the year; that these three nations each pursue the seals in the sea: but that none of them pursue them economically—all aiming at destroying the stock: are all to be restricted according to my friend, or which is to be restricted? If all are on an equality as to wastefulness, or if all are on an equality as to economic use, whose is the right to take? or have none the right to take, or are all excluded? And how are you to determine it, if all three are equally economic:—whose is the right, or whose is the property? The truth is that these vague propositions afford no guide and no help at all to the elucidation of the particular matter in question. It looks to me, indeed, as if this proposition, that property in animals useful to mankind, exhaustible in their nature, is to vest in him who can best utilize such animals and preserve the stock, was a proposition invented to meet the case of fur-seals, invented for the occasion, and ingeniously invented for the purpose of evading the difficulties which stared my friend in the face. I say, therefore, Mr. President, as regards the whole of this matter, and the whole of the argument addressed to these propositions, that while they have a certain academic interest they have only an academic interest; they do not assist this Tribunal in determining the question before us; and, pushed to its legitimate result, even if there be a principle of ethics or economics in it at all, it would result in the affirmation of a principle that property should be attributed to him, or to the nation, that can best turn it to account: a proposition of a very wide character, which would lead to the transfer of a good deal of the world's possessions from the hands that now possess them to others, but for which no warrant is to be found in any system of jurisprudence that I am aware of, and which international law has never even made any approach to recognizing. Let me say in this connection—I shall have to say something about it a little later—that while my friend is quite logical if his original position is correct, namely, that the law of nature and the law of morals are the same as international law—while my friend is quite logical if that first proposition is made out, the superstructure that he has built on that first proposition falls to the ground if that original position is not made out. I say that original position is not made out. I have already dealt with this before in general language—that the moral law and the natural law are not international law, but only so much of them as have been taken up into international law, and adopted with the consent of nations. And I would put this practical test.

1008 Can my friends, or can the erudition of any member of this Tribunal refer to any case of international controversy that has ever been decided by a direct appeal either to the law of nature or to the moral law? I say there is none. The moral law, and the law of nature, of course, have been great factors in the formation of international law, but they are not international law; and I say there is no controversy—of course I speak subject to correction—which can be referred to upon the question of right between nations, which has ever been determined by direct reference either to the moral law or to the law of nature.

Senator MORGAN.—You remember, Sir Charles, that in the Treaty between Great Britain and the United States, the Treaty of Washington in 1871, the two Governments failed to agree as to what the international

was in its application to the alleged fitting out of those cruisers, l so forth. That they agreed upon three distinct propositions or rules right to operate between the two Governments in respect of their troversy. They could not agree on them as propositions of interna- nal law, but they were so obviously just and proper that they made agreement in the same Treaty that hereafter those three propositions uld stand for international law between the two Governments.

Sir CHARLES RUSSELL.—I have no doubt they showed their good se.

Senator MORGAN.—I have no doubt they did.

Sir CHARLES RUSSELL.—But what were they doing?

Senator MORGAN.—Making international law.

Sir CHARLES RUSSELL.—With great deference, supplying the absence international law.

Senator MORGAN.—That is what I mean.

Sir CHARLES RUSSELL.—Doing by Convention that which interna- nal law did not do.

Senator MORGAN.—That is what I mean.

Sir CHARLES RUSSELL.—And in truth that is the subject which must gage your attention a little later when I come to another branch of s case, that the fact is, there being no international law upon this estion, the place of international law is determined by Convention, ich so far as this Tribunal is concerned gets another name—"Regu- ions".

But now I turn from these vague propositions (as I must respectfully l them, while I am sure I do not desire otherwise than to express my miration for the learning and ability of my friend), with a certain se of relief to see whether, when we come to definite authority, my nd is able to produce anything definite in support of his views; and en I come to these authorities what do I find? that of the authorities d, *all* of them support the argument of Great Britain, some of them eed are referred to in it; and to the examination of those authorities w invite the attention of this Tribunal.

9 EXAMINATION OF AUTHORITIES CITED BY THE UNITED STATES.

he authorities cited in the Argument of the United States are to ound at page 108. They begin with a citation from "Studies in Roman law" by Lord Mackenzie.

er in a forest, rabbits in a warren, fish in a pond, or other wild animals in the ing or possession of the first holder cannot be appropriated by another unless regain their liberty, in which case they are free to be again acquired by occu- cy. Tame or domesticated creatures, such as horses, sheep, poultry, and the like, ain the property of their owners, though strayed or not confined. The same rule ails in regard to such wild animals already appropriated as are in the habit of rning to their owners, such as pigeons, hawks in pursuit of game, or bees rming while pursued by their owners.

All perfectly sound—pigeons for whom a dovecote is provided, who supplied with food and induced to return not merely to a particular ce, but to fly for the shelter of home to a particular place. So wks, trained by great effort and labour, to fly game and return to e wrist or shoulder of the owner. So bees, naturally wild, but which a swarm are captured, put into an artificial hive, supplied with food commence their saving operations,—supplied with mechanical con- ivances to aid them in the construction of their combs—it is of these st you will properly say that there is qualified property in them: that at property is not lost when they temporarily disappear. It is in

fact only lost when they have definitely lost their habit of returning, and have resumed their former wild state.

An extract from Gaius' Elements of Roman Law follows, which I do not think I need trouble to read, as it is to the same effect. There is then a quotation from Von Savigny on Possession. The second paragraph is this.

Wild animals are only possessed so long as some special disposition (custodia) exists which enables us actually to get them into our power. It is not every custodia, therefore, which is sufficient; whoever, for instance, keeps wild animals in a park, or fish in a lake, has undoubtedly done something to secure them, but it does not depend on his mere will, but on a variety of accidents whether he can actually catch them when he wishes, consequently, possession is not here retained.

How completely that applies!

When these animals are on the Islands the lessees have the capacity to knock a great many of them on the head and so get possession and capture them; but the moment they go away to sea, they are beyond all human control. And further it is impossible—(as I have pointed out already it makes the case of the seals *a fortiori*), to keep them in that continuous confinement which is possible in the case of purely terrestrial animals, because if they are kept on land they die.

Now about the *animus revertendi* I read from the bottom of page 108 from Savigny.

Wild beasts tamed artificially—

1010 That is to say habituated by art, custom, contrivance and teaching of man.

Wild beasts tamed artificially, are likened to domesticated animals so long as they retain the habit of returning to the spot where their possessor keeps them.

The doves in a dove-cot, the bees in a hive, the hawk, are taught to go and to return—they are artificially tamed.

The next writer cited is Puffendorf, who is one of the class which I may call metaphysical writers, no doubt of great distinction, but one who is always seeking, as I shall show you—(judged not by my statement, I need not say, but by the statements of critical men of authority)—for some metaphysical reason to justfy the existence of a particular law. This illustration of his method occurs to my mind from the reading of it. He explains the right which he admits to exist in all the nations of the world, to take all they choose to get or can get from the high sea; and he explains it upon the reason that the products of the sea are inexhaustible. Well, that may or may not be a metaphysical foundation for the law, but it is clearly not a reason of the law. When nations began to exercise their rights on the high seas, they never asked one another, in settling their mutual rights, if the things they were pursuing were or were not inexhaustible? They pursued them on the high sea because those things were the common property of mankind, and because there was no exclusive right of any one in the sea: because upon the great Ocean all were equal. That I think is a fair illustration of the value of Puffendorf's statements.

Then on page 109 there is a citation from Bracton which I think my friend did not read.

The dominion over things by natural right or by the right of nations is acquired in various ways. In the first place, through the first taking of those things which belong to no person, and which now belong to the King by civil right, and are not common as of olden time, such, for instance, as wild beasts, birds, and fish, and all animals which are born on the earth, or in the sea, or in the sky, or in the air; wherever they may be captured and wherever they shall have been captured, they begin to be mine because they are coerced under my keeping, and by the same

on, if they escape from my keeping, and recover their natural liberty they cease
e mine, and again belong to the first taker. But they recover their natural lib-
, then, when they have either escaped from my sight in the free air, and are no
er in my keeping, or when they are within my sight under such circumstances,
it is impossible for me to overtake them.
cupation also comprises fishing, hunting, and capturing; pursuit alone does not
e a thing mine, for although I have wounded a wild beast so that it may be cap-
d, nevertheless it is not mine unless I capture it. On the contrary it will belong
im who first takes it, for many things usually happen to prevent the capturing
ikewise, if a wild boar falls into a net which I have spread for hunting, and I have
ed it off, having with much exertion extracted it from the net, it will be mine,
shall have come into my power, unless custom or privilege rules to the contrary.
ipation also includes shutting up, as in the case of bees, which are wild by
re, for if they should have settled on my tree they would not be any the more
,—

l on his land still—on his tree:

l I have shut them up in a hive, than birds which have made a nest in my tree,
therefore if another person shall shut them up, he will have the dominion over
. A swarm, also, which has flown away out of my hive, is so long understood
e mine as long as it is in my sight, and the overtaking of it is not impossible,
rwise they belong to the first taker; but if a person shall capture them, he does
make them his own if he shall know that they are another's, but he commits a
t unless he has the intention to restore them. And these things are true, unless
etimes from custom in some parts the practice is otherwise.
hat has been said above applies to animals which have remained at all times
; and if wild animals have been tamed, and they by habit go out and return, fly
y, and fly back, such as deer, swans, seafowls, and doves, and such like, another
has been approved, that they are so long considered as ours as long as they
the disposition to return; for if they have no disposition to return they cease
e ours.

have already pointed out that Savigny expresses the true meaning
he word "habituated" to return, or "accustomed" to return, when
describes it as the taming of the animal artificially.
hen, on page 110, there is a citation from Bowyer, a most respecta-
gentleman but not admitted amongst the highest authorities, I
k, but entirely in our favor. Sir George Bowyer is known to some
he Arbitrators, I know. He is known to Lord Hannen I am sure,
known to me very well, and to my friends. In the second paragraph
he citation he says:

hen you have caught any of these animals it remains yours so long as it is
r the restraint of your custody. But as soon as it has escaped from your keep-
and has restored itself to natural liberty, it ceases to be yours and again becomes
property of whoever occupies it. The animal is understood to recover its natural
ty when it has vanished from your sight, or is before your eyes under such
umstances, that pursuit would be difficult.

hen in the middle of the next page 111, he says:

e general principle respecting the acquisition of animals, *feræ naturæ*, is that it
surd to hold anything to be a man's property which is entirely out of his power.

so on.
hen the edition of the Institutes of Justinian, of Cooper, is referred
t page 112.

ction 12. *De Occupatione Ferarum.*—Wild beasts, birds, fish, and all animals, bred
er in the sea, the air, or upon the earth, so soon as they are taken, become by
law of nations, the property of the captor.

ought to say, I think, with great deference, it is hardly correct to
there "the law of nations." It really is, *jus gentium.* I suppose
at really is meant there is the law of *particular* nations.—It is not
jus inter gentes, which is referred to; it is the *jus gentium.*
he PRESIDENT.—I believe from my recollection of Roman law *jus*
tium meant natural law.

Sir CHARLES RUSSELL.—The laws common to those nations whi were known to the Romans.

1012 The PRESIDENT.—The Romans, of course, were not consider as having any international law.

Sir CHARLES RUSSELL.—Then the Case of the Swans—(7 Coke, b.), is pointed on page 113. The swan being one of the animals rec oned a royal bird, the keeping of it required a royal franchise. T technical phrase is the keeping of a "game" of swans. As we all kno swans are marked, and this case really goes further in one sense agai the contention of my friend than he seems to suppose, because at t top of page 114 it is said:

It was resolved that all white swans not marked, which have gained their natu liberty, and are swimming in an open and common river, might be seized to t King's use

But how?

by his prerogative, because *Volatilia (quæ sunt feræ naturæ) alia sunt regalia, alia c munia;* . . . as a swan is a royal fowl; and all those, the property whereof is n known, do belong to the King by his prerogative; and so whales, and sturgeons, a royal fish, and belong to the King by his prerogative.

But it was resolved also that the subject might have property in white swans marked, as some may have swans not marked in his private waters, the property which belongs to him and not to the King; and if they escape out of his priv waters into an open and common river, he may bring them back and take th again. And therewith agreeth Bracton.

Then he goes on:

But if they have gained their natural liberty, and are swimming in open and co mon rivers, the King's officer may seize them in the open and common river for t King; for one white swan without such pursuit as aforesaid can not be known fr another; and when the property of a swan can not be known, the same being of nature a fowl royal, doth belong to the King.

I do not think I need trouble by reading that authority further. Th on page 115 there is a reference to the case of *Child v. Greenhill*, Croke, 553).

Trespass for entering and breaking plaintiff's close and fishing and taking fish his several fishery. Contended for the defendant that he could not say "his" fish for he hath not any property in the fish until he takes them and has them in his p session. Attorneys for plaintiff maintained that they were in his several fishery. a that he might say "his" fishes, for there was not any other that might take the and all the court was of that opinion.

Now this is a matter which, Lord Hannen will forgive me for sayi so, requires a word of explanation, for I doubt if it would otherwise intelligible to those members of the Tribunal who are not acquaint with the technical rules of pleading. The question arose on demurre that is to say, the plaintiff was complaining that he, being the owner a several fishery, the defendant broke and trespassed and took a carried away his fish, whereupon the defendant pleaded—You cann say they are "your" fish, because they are not in your possession; th were merely in your pond, or your fishery; and, therefore, you cann say—it is erroneous to say, as a matter of law and pleading—they a "your" fish at all. The complaint being trespass on the fishe

1013 the Court thereupon decides that, if they were nobody else's fi they certainly were not the defendant's who is breaking and ent ing; and on the question of pleading, that the pleading is not bad whi complains of trespass of the several fishery, merely because it stat these fish are the property of the plaintiff. That is the whole case.

The case of *Keeble v. Hickeringill* is next cited. This I shall refer because it is not set out in the citation at page 115 quite fully, and

have, therefore, the report before me. The report is in the note to 11 East's Reports, at page 573. It was decided in the year 1809.

Now this was the case and it is an important case. The Plaintiff had erected at his own expense upon his own land, or upon the water in his own land, a decoy:—decoys were at one time a considerable industry in various places—in order to attract ducks to that decoy; and his complaint was that the Defendant, intending to injure him, and maliciously, not in exercise of a right of his own, or for purposes of his own, but maliciously, had fired guns in the neighbourhood of that decoy, in order to frighten the ducks away from it, and the question was whether that was or was not a good cause of action. The ducks attracted to the decoy were, of course, wild ducks in which the Plaintiff could claim no property, and did claim no property till he had actually shot them or captured them. His complaint was not that, but that the Defendant had done that maliciously to injure him not in the exercise of any right, but with a view to disturbing him, the Plaintiff, in reaping the benefit of his decoy: and the question was whether that gave him a cause of action.

There is so much to say, and I am anxious to get over the ground, that I will read only enough to bring out that point.

Action upon the case. Plaintiff declares that he was, on the 8th of November in the second year of the Queen, lawfully possessed of a close of land and a decoy upon it, to which wild fowl used to resort; and the Plaintiff had at his own costs and charges prepared and procured divers decoy-ducks, nets, machines, and other engines for the decoying and taking of the wild fowl, and enjoyed the benefit in taking them. The defendant, knowing which and *intending to damnify the Plaintiff* in his vivary, and to fright and drive away the wildfowl used to resort thither, and deprive him of his profit, did, on the 8th of November, resort to the head of the said pond and vivary and did discharge six guns laden with gun-powder, and with the noise and stink of the gunpowder did drive away the wildfowl then being in the pond; and on the 11th and 12th days of November the Defendant, *with design to damnify* the Plaintiff and fright away the wildfowl, did place himself with a gun near the vivary.

And so on, and Chief Justice Holt, a Judge of great authority, deals with the matter thus—

When a man useth his art or his skill to take them to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so?

1014 And so on;

But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the Plaintiff's, and that had spoilt the custom of the Plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the Plaintiff.

The action was simply brought against the Defendant for an act not purporting to be done in exercise of a right of his, but *maliciously* done in order to injure and damnify the Plaintiff.

Lord HANNEN.—At page 116 in the "Modern Report", the antithesis is brought out very clearly.

Suppose the Defendant had shot in his own ground, if he had occasion to shoot, it would be one thing, but to shoot on purpose to damage the Plaintiff is another thing and a wrong.

Sir CHARLES RUSSELL.—Quite so. The appositeness is clear enough, because the Tribunal will see, whatever else has been said about pelagic sealers, there is one thing that has not been said, and could not be said, and that is this: that these pelagic sealers, largely American and largely Canadian, were pursuing pelagic sealing maliciously intending to injure anybody. They were pursuing what they considered to be a right, and they were pursuing this mode of capture or industry in order to earn the profit which accrued to them from its pursuit.

Now I turn to the case of *Amory v. Flyn*. But, why these cases have been cited, I do not know. It sometimes has come into my mind that my learned friend, with the multiplicity of affairs which no doubt occupied him, turned some intelligent student into a library to copy wholesale passages and pages which have some remote bearing on the case.

Lord HANNEN.—But some of them have a considerable bearing, and may have been put in out of fairness as being authorities against them.

Sir CHARLES RUSSELL.—Well, my Lord, I withdraw what I said. My learned friends have been good enough to supply us with them, and I withdraw what I said, and I ought not properly to have said it.

What is this case? It is a case in which one Amory brought an action of trover against Flyn before the Justice for two geese: It is an American case and is reported in 10 Johnson's Reports.

The plaintiff proved a demand of the geese and a refusal by the defendant unless the plaintiff would first pay 25 cents for liquor furnished to two men who had caught the geese and pledged them to the defendant for it.

The geese were of the wild kind, but were so tame as to eat out of the hand. They had strayed away twice before, and did not return until brought back. The plaintiff proved property in them, and that after the geese had left his premises, the son of the defendant was seen pursuing them with dogs and was informed that they belonged to the plaintiff.

1015 In other words, they were tame geese, and that is what the Court said.

Per curiam. The geese ought to have been considered as reclaimed so as to be the subject of property. Their identity was ascertained; they were tame and gentle, and had lost the power or disposition to fly away. They had been frightened and chased by the defendant's son, with the knowledge that they belonged to the plaintiff, and the case affords no colour for the inference that the geese had regained their natural liberty as wild fowl and that the property in them had ceased.

Again, on page 117 is the case of *Goff* v. *Kilts;* that is also an American authority, reported in 15th Wendell's Reports.

The owner of *bees* which have been reclaimed

mark the word "*reclaimed*"—

may bring an action of *trespass* against a person who cuts down a tree into which the bees have entered *on the soil of another*, destroys the bees and takes the honey.

Where bees take up their abode in a tree, they belong to the *owner of the soil*, if they are *unreclaimed*, but if they have been *reclaimed*, and their owner is able to identify his property, they do not belong to the owner of the soil, but to him who had the former possession, although he cannot enter upon the lands of the other to retake them without subjecting himself to an action of trespass.

The only point on that which I should have thought was a little doubtful, but which I think is not material here, is where he says it belonged to the owner of the tree. I do not think myself that that would be quite so. It merely means, I think, they belonged to him in the sense that he would have the right to take them.

Mr. CARTER.—The case does not decide it.

Sir CHARLES RUSSELL.—No. I am much obliged to my learned friend; it is really a mistake. It is the headnote by the reporter of the

case, and not the Judgment. I have the reports here, and they are at the service of any Members of the Tribunal who desire to look at them. Then it proceeds.

Error from the Madison Common Pleas. Kilts sued Goff in a justice's court in *trespass* for taking and destroying a swarm of *bees*, and the honey made by them. The swarm left the hive of the plaintiff, flew off and went into a tree on the lands of the Lenox Iron Company. The plaintiff kept the bees in sight, followed them, and marked the tree into which they entered.

This was obviously a swarm which the Plaintiff had hived; he was able to identify them; he keeps them in sight, follows them, and marks the tree into which they enter.

Two months afterwards the tree was cut down, the bees killed, and the honey found in the tree taken by the defendant and others. The plaintiff recovered judgment, which was affirmed by the Madison Common Pleas. The defendant sued out a writ of error.

By the Court, Nelson, J.: Animals *feræ naturæ*, when reclaimed by the art and power of man—

That is the true doctrine of reclamation:

are the subject of a qualified property; if they return to their natural liberty and wildness, without the *animus revertendi*, it ceases. During the existence of the qualified property, it is under the protection of the law the same as any other property, and every invasion of it is redressed in the same manner. *Bees* are *feræ naturæ*, but when hived and reclaimed, a person may have a qualified property in them by 1016 the law of nature, as well as the civil law. Occupation, that is hiving or inclosing them, gives property in them. They are now a common species of property, and an article of trade, and the wildness of their nature, by experience and practice, has become essentially subjected to the art and power of man. An unreclaimed swarm, like all other wild animals, belongs to the first occupant—in other words, to the person who first hives them; but if the swarm fly from the hive of another, his qualified property continues so long as he can keep them in sight, and possesses the power to pursue them.

That is all I think that I need read of that case.

Now, the case of *Blades v. Higgs* is on page 119; and I have the report of that case here also. It was decided by the House of Lords in 1865. You will find it reported in the 11th "House of Lords' Cases", at page 621. The sole question in the case was this;—Was the property in certain rabbits killed by a trespasser on the land of another person, in the man who killed, them or were the dead rabbits the property of the man on whose land they were killed? And I yesterday stated, subject to being corrected by the Marquis Venosta if I am wrong, that, according to the Roman Law, the actual taker, though a trespasser, would have the right of property; wherein the American and the English Law differ from the Roman Law. The sole question, therefore, in the case was, to which of two persons did the property belong? The rabbits were shot, and the question was, to whom they belonged?

Now, Lord Chancellor Westbury, at page 631, thus states the law.

My Lords, when it is said by writers on the common law of England that there is a qualified or special right of property in game, that is in animals *feræ naturæ* which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word "property" can mean no more than the exclusive right to catch, kill and appropriate such animals, which is sometimes called by the law a reduction of them into possession. This right is said, in law, to exist *ratione soli* or *ratione privilegii*, for I omit the two other heads of property in game which are stated by Lord Coke, namely *propter industriam* and *ratione impotentiæ*, for these grounds apply to animals which are not in the proper sense *feræ naturæ*. Property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil.

Then further on he continues:

The question in the present case is whether game found, killed, and taken upon my land, by a trespasser becomes my property as much as if it had been killed and taken by myself, or my servant by my authority. Upon principle there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act, for it would be unreasonable to hold that the act of the trespasser, that is of a wrongdoer, should divest the owner of the soil of his qualified property in the game, and give the wrongdoer an absolute right of property to the exclusion of the rightful owner.

But in game, when killed and taken, there is absolute property in some one, and, therefore, the property in game found and taken by a trespasser on the land of A. must vest either in A. or the trespasser; and, if it be unreasonable to hold that the property vests in the trespasser or wrongdoer, it must of necessity be vested in A., the owner of the soil.

1017 Then he proceeds to the conclusion that it vested in the owner of the soil.

In this connection an erroneous reference I think is made by my learned friends in note in their printed Argument attributing I think to Lord Chelmsford what in point of fact I think Lord Chelmsford did not say. The note is on page 54.

Lord Chancellor Chelmsford made the proposition that every thing must be owned by some one, the ground of his decision in the House of Lords in the case of *Blades v. Higgs*.

I think that will not be found to be quite correct.

Mr. CARTER.—I should say it was entirely correct from what you have read.

Sir CHARLES RUSSELL.—I have not yet read Lord Chelmsford.

Lord HANNEN.—He uses a phrase which Mr. Carter thinks is equivalent.

Sir CHARLES RUSSELL.—I quite agree, applied to the particular case it is the equivalent of it, and it is quite right, but the statement is attributed to Lord Chelmsford.

Lord HANNEN.—It is not a general proposition; it is with regard to the facts of the particular case.

Sir CHARLES RUSSELL.—Quite so, it is not worth dwelling upon. The general proposition that everything must be owned by somebody is attributed to Lord Chelmsford.

Lord HANNEN.—I have opposite to my note on that "page 113"; there may be something there.

Sir RICHARD WEBSTER.—That is where it is noted in the Appendix later on.

Sir CHARLES RUSSELL.—Yes that is the page I have now got to in the Argument. It is not worth dwelling upon. The Judges agree in saying the rabbits which were killed were wild: they were killed by a trespasser on the land of A, and the question was whose is the property? And contrary to the Roman law they arrived at the conclusion that the property was not the trespasser's, but that of the man on whose land it was killed.

The PRESIDENT.—Before you leave that subject, will you allow me to put a question relating to one of the earlier cases because I should like to know your explanation.

Sir CHARLES RUSSELL.—On what page is it?

The PRESIDENT.—It is about the white swans on page 114. There is this, that property vested in the King by reason of his prerogative because—

Volatilia (quæ sunt feræ naturæ) alia sunt regalia, alia communia.

Well of course instead of "*volatilia*" you might use *animalia* in general. Would you consider that, in the case of the white swans, this

operty vindicated by the King of England would go beyond the limits of the jurisdictional power of the King of England—would
18 you consider that as a right of absolute property, which might be vindicated even abroad out of the limits of the realm?

Sir CHARLES RUSSELL.—I should like to consider that, Baron, if u think it important; but I should have thought not.

The PRESIDENT.—Yes I should like to have some explanation of it. you like to think of it by to-morrow please do so.

Senator MORGAN.—Do you mean, Mr. President, going outside the ılm?

The PRESIDENT.—Yes, with reference to the question you put before.

Senator MORGAN.—If the Government has the right by its municipal vs to appropriate to itself all property that does not belong to anydy else it does not necessarily follow that that right must be recogzed by other nations.

The PRESIDENT.—Well, Sir Charles, perhaps you will be kind enough think of it.

Sir CHARLES RUSSELL.—Yes, I should say, as regards the nationals the particular country, that the legislative power might decree anying it pleased as regards property in white swans or anything else ıerever that property was, in any part of the world, as regards subts or nationals; but so far as legislation could affect anything outside e territory, so far as foreigners are concerned, I should have supposed could not affect them outside the realm.

Senator MORGAN.—The question, to my mind, arose more particuly in respect to that part of the three propositions submitted in ticle I of the Treaty, relating to the right of pelagic hunting, as we ll it, the right of taking seals. It includes and makes it incumbent on the Arbitrators to decide as to the rights of the citizens and subts of both countries, not one but both. Well, it is a material fact that e United States have asserted and acquired property by their municıl laws in the fur-seals within their recognized jurisdiction. When e seals are beyond that jurisdiction, then the Tribunal has to decide ıether the citizens of the United States have the right to take those ıls although they are appropriated to the Government of the United ıtes, and their taking within the jurisdictional limits of the United ıtes is prohibited under severe penalties. It is a peculiar attitude the case is stated here, and one that has given me some concern.

Sir CHARLES RUSSELL.—May I point out, Senator, there seems to be ındamental error of fact in the statement you have made, because e United States never has, by its legislation, asserted property in e fur-seals.

Senator MORGAN.—We differ as to that, you see.

Sir CHARLES RUSSELL.—Well, I shall be glad to be referred to any ıce where they have asserted property. They have asserted an clusive right of legislation in the eastern part of Behring Sea. They ve, by that legislation, claimed to exclude all persons from the pursuit of pelagic sealing in that area; but they have never
19 by legislation, or by judgment in any of the Courts, affirmed property in the fur-seal either in the United States or in anydy else.

The PRESIDENT.—That is a question of fact which may be different om the other, but I would like to know your opinion on the question right in the case of swans. It is not absolutely irrelevant, I think, ıd I should like to hear your observations about it.

Sir CHARLES RUSSELL.—Certainly, Sir.

Then further on he continues:

The question in the present case is whether game [illegible] more passage from my land, by a trespasser becomes my property as [illegible] of the Report. taken by myself, or my servant by my authori[illegible] therefore, there can be no doubt conceive, be much difficulty. If property i[illegible] remain in the state of nature. It is into possession, such reduction must not [illegible] by the owner of the land on which able to hold that the act of the trespa[illegible] become at once his property, absolutely owner of the soil of his qualified r[illegible] when they are reclaimed? absolute right of property to the [illegible]

But in game, when killed a[illegible] reclaimed the property is qualified and therefore, the property in g[illegible] again, the property is gone. must vest either in A. or t[illegible] case of Morgan and the executors of property vests in the tr[illegible] the Earl of Abergavenny. I have here the the owner of the soil.

1017 Then b[illegible] it is reported in the 8th Common Bench of the [illegible]

In this [illegible] Abergavenny covers a good many pages in the learned fr[illegible] but the point may be stated very briefly. The short Lord C[illegible] deer were wild and unreclaimed, they did not say. [illegible] representatives of the late owner. If they were Lo[illegible] in the category of domesticated animals, they did by [illegible] representative of the late owner. That is the short point. v. [illegible] all what the jury found. The facts are stated in vari-

ous ways:

These deer were fed. They were described as to their habits as being to a large extent at least tame, some shy and timid. The report continues:

That they very rarely escaped out of the boundaries; that they were attended by keepers, and were fed in the winter with hay, beans and other food; that a few years back a quantity of deer had been brought from some other place and turned into Eridge Park; that the does were watched, and the fawns, as they dropped, were constantly marked, so that their age at a future time might be ascertained; that, at certain times, a number of deer were selected from the herd, caught with the assistance of dogs, and were put into certain parts of the park, which were then inclosed from the rest, of sufficient extent to depasture and give exercise to the selected deer, which were fattened and killed, either for consumption, or for sale to venison dealers; that the deer were usually killed by being shot; that there was a regular establishment of slaughter houses, for preparing and dressing them for use.

Those are all the facts I need trouble you with.

The jury found that the place was an ancient park with all the incidents of a legal park: Secondly, that the boundaries of the ancient park could be ascertained. They expressed a wish to abstain from finding for either plaintiffs or defendant; but upon being required to
1020 do so, they found a verdict for the plaintiffs, and stated that the animals had been originally wild, but had been reclaimed. Therefore the jury found that they were reclaimed animals—originally in the class of wild animals, but reclaimed.

Then the rule came on for argument. I read now from the judgment.

The PRESIDENT.—Does it appear that those deer were selected and shut up to be fattened?

Sir CHARLES RUSSELL.—Oh no; the question arose as to all the deer, some of whom were shut up and fattened. The report continues:

The rule came on to be argued in Easter term, 1848; and it appeared, upon the discussion, that the objection that no sufficient verdict had been found by the jury, had been urged upon a misapprehension of what the jury had said.

The judgment of the court was delivered by Mr. Justice Maule, the argument having been heard before Chief Justice Wilde, Mr. Justice Coltman, and Mr. Justice Creswell: and the learned Judge said.

The second objection [to the summing up of the Judge] was that the Judge had misdirected the jury; and it was contended, in support of that objection, that the

ust be held to have misdirected the jury in having omitted to impress suffi-
pon them the importance of the fact of the deer being kept in an ancient
But the judge *did* distinctly direct the attention of the jury to the fact
being in a legal park, if such should be their opinion of the place, as an
gredient in the consideration of the question whether the deer were
ot, when he directed them that the question whether the deer had been
be determined by a consideration, among the other matters pointed
and dimensions of the park in which they were confined; and we
ny objectionable omission in the Judge's direction in this respect,
ry ought to have been directed that such fact was conclusive to negative
mation of the deer.

Then he proceeds to deal with the facts, and he says:

It is not contended that there was no evidence fit to be submitted to the jury, and that therefore the plaintiff ought to have been nonsuited; but it is said that the weight of the evidence was against the verdict.

He deals with that question thus:

In considering whether the evidence warranted the verdict upon the issue, whether the deer were tamed and reclaimed, the observations made by Lord Chief Justice Willes in the case of *Davies* v. *Powell* are deserving of attention. The difference in regard to the mode and object of keeping deer in modern times, from that which anciently prevailed, as pointed out by Lord Chief Justice Willes cannot be overlooked. It is truly stated, that ornament and profit are the sole objects for which deer are now ordinarily kept, whether in ancient legal parks, or in modern inclosures, so called; the instances being very rare in which deer in such places are kept and used for sport; indeed, their whole management differing very little, if at all, from that of sheep, or of any other animals kept for profit. And in this case, the evidence before adverted to, was, that the deer were regularly fed in the winter; the does with young were watched; the fawns taken as soon as dropped, and marked; selections from the herd made from time to time, fattened in places prepared for them, and afterwards sold or consumed,—with no difference of circumstance than what attached, as before stated, to animals kept for profit and food.

As to some being wild, and some tame, it is said,—individual animals, no doubt differed, as individuals in almost every race of animals are found, under any circumstances, to differ in the degree of tameness that belongs to them. Of deer
1021 kept in stalls, some would be found tame and gentle, and others quite irreclaimable, in the sense of temper and quietness.

Upon a question whether deer are tamed and reclaimed, each case must depend upon the particular facts of it; and, in this case, the Court think that the facts were such as were proper to be submitted to the jury; and, as it was a question of fact for the jury, the Court cannot perceive any sufficient grounds to warrant it in saying that the jury have come to a wrong conclusion upon the evidence.

I therefore wish to point out that all that case really shows is that, upon certain evidence, it was submitted as a question of fact to a jury, who are, according to the English system of jurisprudence, charged with the determination of questions of fact, whether or not, in the circumstances of the particular case, the deer in question belonged to the category of wild and unreclaimed deer, or belonged to the category of tamed and reclaimed deer; whether in fact in the opinion of the jury they were tamed and reclaimed. The jury found that in fact they were tamed and reclaimed. That is the whole case.

Next we have the case of *Davies* v. *Powell*, which is reported in Willes' Reports. It was decided in 1737, long previous to the case last mentioned; in the middle of the last century. This was of the same class of cases for which I must be forgiven for uttering one word of explanation. This was also on demurrer. It is found on page 126 of the United States Argument:

Trespass for breaking and entering the close of the plaintiff called Caversham Park, containing 600 acres of land, etc., for treading down the grass, and for chasing, taking and carrying away *diversas feras, videlicet*, 100 bucks, 100 does and 60 fawns of the value of £600 of the said plaintiff *inclusas et coarctatas* in the said close of the plaintiff.

You will see therefore that the plaintiff was complaining that these 100 bucks, does, etc. which he said were his, were *inclusas et coarctatas* in the close of the plaintiff.

Lord HANNEN.—Can you explain the use of that Latin? It was long after Latin had been used in that way.

Sir RICHARD WEBSTER.—As late as the middle of the last century I think some words were still used in certain portions of the pleadings.

Lord HANNEN.—That is the explanation I had given of it, that certain phrases were used.

Sir CHARLES RUSSELL.—Yes; certain words of art were used in the Latin tongue. I think that is the explanation. But the question here was: Whether they were distrainable for rent which the plaintiff owed to his landlord, Lord Cadogan: and if they were the plaintiff's property they were distrainable for rent, but if they were not the plaintiff's property, if they were animals *feræ naturæ* and wild, then they were not distrainable; but he was complaining that they had been seized to pay the rent he owed, and he described them as his own bucks and his own fawns, as *inclusas et coarctatas* in his close.

This is again raised on demurrer. That is to say the plaintiff having made this complaint, the defendant pleads, "I seized them for
1022 rent. Admitting all your facts, I seized them for rent"; whereupon a demurrer to that defence. If you will turn to page 127, the matter explains itself pretty well. It is the second paragraph:

To this plea the plaintiff demurs generally, and the defendants join in demurrer.

The technical effect of that, Mr. President, is this: That the plaintiff says: Although I admit that the facts you set up in the defence are true in fact, I deny that in point of law they afford an answer to my claim.

That is the effect of the demurrer. Then the report goes on:

And the single question that was submitted to the judgment of the court is whether these deer under these circumstances, as they are set forth in the pleading, were distrainable or not. It was insisted for the plaintiff that they were not;

(1) Because they were not *feræ naturæ*, and no one can have absolute property in them.

(2) Because they are not chattels, but are to be considered as hereditaments and incident to the park.

(3) Because if not hereditaments, they were at least part of the thing demised.

(4) Their last argument was drawn *ab inusitato*, because there is no instance in which deer have been adjudged to be distrainable.

Then the argument is set out. The judgment of the Chief Justice is given. He says:

I do admit that it is generally laid down as a rule in the old books that deer, conies, etc., are *feræ naturæ*, and that they are not distrainable; and a man can only have a property in them *ratione loci*.

"*Ratione loci*" is only another way of saying *ratione soli*.

And therefore in the case of swans (7 Co. 15, 16, 17, 18) and in several other books there cited it is laid down as a rule that where a man brings an action for chasing and taking away deer, hares and rabbits, etc., he shall not say *suos*, because he has them only for his game and pleasure *ratione privilegii* whilst they are in his park, warren etc. But there are writs in the register (fol. 102), a book of the greatest authority, and several other places in that book which show that this rule is not always adhered to. The writ in folio 102 is *quare clausum ipsius et intravit et cuniculos suos cepit*.

The reason given for the opinion in the books why they are not distrainable is that a man can have no valuable property in them, etc.

Then comes the real ground of the decision, the second paragraph at the top of page 128:

And that this is the case of the deer which are distrained in this present case is admitted in the pleadings. The plaintiff by bring an action of trespass for them in some measure admits himself to have a property in them; and they are laid to be *inclusas et coarctatas* in his close,

"They are laid to be", means "alleged to be"—

which at least gave him a property *ratione loci;* and they are laid to be taken and distrained there; but what follows makes it still stronger, for in the demise set forth in the plea and on which the question depends, they are several times called the deer of John Davies, the plaintiff.

. . . . The plaintiff therefore in this case is estopped to say either that he had no property in them or that his property was of no value.

1023 The case is a case decided on demurrer and it is only of interest technically. It decides nothing. It simply says—

You as plaintiffs have alleged they were your property. If they were your property, they were distrainable. The Court therefore say it is a good plea, and it is a good answer to your claim.

I have come to the end of all the authorities cited on the question of property, with one exception, and that is an additional authority cited by my learned friend Mr. Phelps at page 180 of the printed argument. That is the only case which he adds to the authorities citied by my friend Mr. Carter, the case of *Hannam* v. *Mocket.* This is a case of rooks. I have got the report here for the use of my learned friends if they desire it, or for any member of the Court; but there is quite enough in this for me to refer to.

The facts there are these:

The declaration [that is to say the plaintiff's claim] stated that the plaintiff was possessed of a close of land with trees growing thereon, to which rooks had been used to resort and to settle and to build nests and rear their young in the trees. That is to say, they came there year after year to this same place; by reason whereof plaintiff had been used to kill and take the rooks and the young thereof, and great profit and advantage had accrued to him, yet that the defendant wrongfully and maliciously intending to injure the plaintiff and alarm and drive away the rooks and cause them to forsake the trees of the plaintiff, wrongfully and injuriously caused guns loaded with gun-powder to be discharged near the plaintiff's close, and thereby drove away the rooks; and thereby the plaintiff was prevented from killing and taking the young thereof.

I need not say that rook-pie is supposed to be an edible commodity; and the shooting of young rooks sometimes amuses youthful sportsmen at all events.

Plea not guilty.

The general issue, in fact.

"Plea not guilty" means I deny what you say; I did not do the thing. The Case is tried; decided in a particular way; and then after trial, motion in arrest of judgment: it was held that this action was not maintainable, inasmuch as rooks were a species of bird *feræ naturæ*, destructive in their habits, not known as an article of food, or alleged to be so, not protected by any Act of Parliament; and the plaintiff could not have any right in them or show any right to have them resort to his trees. I should like to read what Mr. Justice Bayley says in giving judgment:

A man's rights are the rights of personal security, personal liberty, and private property. Private property is either property in possession, property in action, or property that an individual has a special right to acquire. The injury in this case does not affect to be right of personal security or personal liberty, nor any property in possession or in action; and the question then is whether there is any injury to

any property the plaintiff had a special right to acquire. A man in trade has a right in his fair chances of profit and he gives up capital to obtain it. It is for the good of the public that he should. But has it ever been held that a man has a right in the chance of obtaining animals *feræ naturæ* where he has had no expense in inducing them to his premises, and where it may be at least questionable whether they
1024 will be of any service to him, and whether indeed they will not be a nuisance to the neighbourhood. This is not a claim *propter impotentiam* because they are young, *propter solum* because they are on the plaintiff's land, or *propter industriam* because plaintiff has brought them to the place or reclaimed them, but *propter usum et consuetudinem* of the birds.

In other words, the migratory habits, the *animus revertendi*, of the birds.

They of their own choice and without any expenditure or trouble on his part have a predilection for his trees and are disposed to resort to them.

The seals have a predilection for the Pribilof Islands and have a right to resort to them.

But has he a legal right to insist that they shall be permitted to do so? Allow the right as to these birds and how can it be denied as to all others.

Then he proceeds to point out the distinction in a claim of this kind between birds that are fitted for food and birds that are not fitted for food. He says:

It is not alleged in this declaration that these rooks were not fit for food; but we know in fact that they are not generally so used, etc.

Then follows a passage which is omitted in the Argument, but which is not unimportant. It follows after the word "established". He says:

So far from being protected by law they have been looked upon by the Legislature as destructive in their nature and as nuisances to the neighbourhood where they are.

Then follows the passage which is omitted.

It has been said that a man may acquire rights over other animals similis naturæ as affording him diversion, such as rabbits in a warren, doves in a dove-cote. But first it is to be observed that rabbits and pigeons are not only subjects of diversion but constitute an article of food. In the second Inst. 199, it is said that the common law gave no way to matters of pleasure (wherein most men do exceed) for that they brought no profit to the commonwealth; and therefore it is not lawful for any man to erect a park, chace, or warren, without a license under the great seal of the King... And even with respect to animals *feræ naturæ*, though they may be fit for food, such as rabbits, a man has no right of property in them.

Then he goes on to explain, in the way so many other authorities have done, what are the rights in respect to animals *feræ naturæ, ratione soli*, etc.

I have exhausted the authorities, I have considered every authority that has been cited by my learned friend on this point; and I am not justified in doing more than submitting to the Tribunal at this stage of the argument that there is not one of them which is not in favor of the propositions for which we are contending, the non-existence of property in the particular animal with which we are dealing in this case.

The Tribunal here adjourned for a short time.

The PRESIDENT.—Sir Charles, we are ready to hear you.

Sir CHARLES RUSSELL.—My friend Mr. Phelps has courteously intimated to me that his impression is that in that case of *Goff* v. *Kilts* (which is at page 117 of the printed Argument of the United States), the learned Judge did affirm the proposition that when bees take
1025 up their abode in a tree they belong to the owner of the soil, if they are unreclaimed. I respectfully differ from my friend. What I first read is the head note of the case—not the reported words of the Judge. The head note ends with the word "trespass"; but if,

Mr. President, you will turn to page 118 of the printed Argument which is the only foundation for that note in the judgment), I think it will be seen that it does not rightly construe what the learned Judge said. It is the sentence beginning:

It is said the *owner of the soil* is entitled to the tree and all within it. This may be true, so far as respects on unreclaimed swarm. While it remains there in that condition, it may like birds or other game, (game laws out of the question) belong to the owner or occupant of the forest *ratione soli*. According to the law of nature, where prior occupancy alone gave right, the individual who first hived the swarm would be entitled to the property in it; but since the institution of civil society, and the regulation of the right of property by its positive laws, the forest as well as the cultivated field, belong exclusively to the owner, who has acquired a title to it under those laws. The natural right to the enjoyment of the sport of hunting and fowling, wherever animals *feræ naturæ* could be found, has given way, in the progress of society, to the establishment of rights of property better defined and of a more durable character. Hence no one has a right to invade the enclosure of another for his purpose. He would be a trespasser; and, as such, liable for the game taken. An exception may exist in the case of noxious animals, destructive in their nature. Mr. Justice Blackstone says:—If a man starts game in another's private grounds, and kills it there, the property belongs to him in whose ground it is killed, because it was started there, the property arising *ratione soli*. (2. Black Com., 419.) But if animals *feræ naturæ* that have been *reclaimed*, and a qualified property obtained in them, escape into the private grounds of another in a way that does not restore them to their natural condition, a different rule obviously applies. They are then not exposed to become the property of the first occupant. The right of the owner continues—

and so on.

I submit it is clear that the learned Judge there is referring to the argument in the course of the case, in which he says.

It is said the *owner of the soil* is entitled to the tree and all within it. This may be true.—

He is treating it as a point made in argument; but he goes on to show, in the very next words, that he is there referring not to the question of property strictly so called, but to the right of the owner *ratione soli*, that exclusive right to take, and there being no property without taking. As my friend was good enough to call my attention to it, I thought it right to make that observation.

Now, I have exhausted all the authorities cited by my learned friends in the course of their written Argument, and there were none others referred to in the course of the oral argument; but my friend Mr. Carter has been good enough to furnish us with a small volume,—I do not know whether the members of the Tribunal have had it or not,—it is entitled, "Citations from the Writings of Jurists and Economists illustrating and supporting certain propositions maintained in the Argument of the United States upon the subject of property". Well, I wish to pay every tribute to the erudition and labour of my friend; but when
026 I cite the propositions in respect to which these authorities are collected together, unless I am invited to do it by the Court, I certainly do not intend to pursue the enquiry further.

Now, the propositions are these.

FIRST. That the earth and all its bounties were originally bestowed upon mankind in common.

SECOND. That the institution of *property*, and especially of *private property* exists only for the satisfaction of the great social necessities of mankind.

That such necessities may be generally described as two-fold:

1. The preservation of peace and order.

2. The *preservation* of the gifts of nature, and the making of them *more productive*, in order to support the increasing population of the earth which the advance of civilization necessarily involves.

THIRD. That the institution of property is governed by the *social necessities* which it is designed to satisfy; and will be extended to every subject to which those necessities require its extension.

FOURTH. That the extent of the dominion which is allowed by the institution of property, either to nations or to individuals, is always limited by the social duties which invariably accompany it.

1. It is the *use* only which is given.

2. They must be so used as to carry out the purpose of the original gift for the benefit of all mankind. What is not needed for the use of the nation or individual owning the gift must be offered on reasonable terms to the rest of mankind.

3. Nothing must be wantonly or needlessly destroyed.

FIFTH. Wherever a useful thing is not furnished by nature in quantities sufficient to satisfy the desires of *all*, and will be exhausted unless it may be preserved by making it the subject of property, it must be made the subject of property.

I really do, with the greatest deference to my friend, and not, I hope, using more vehemence of language, or pointedness of language than the occasion requires, say that this is an invitation to us very far afield from the question that you have to decide. You are not here framing laws; you are not here judges of ethics or of morals; you are here to declare what the law is; and you are not even to trouble to enquire into the foundation upon which the law rests, but you are to declare it as you believe it to be.

Additional authorities cited by Great Britain.

Now I have to supplement these authorities by certain authorities referred to in our Argument and Counter-Case. In the British Counter-Case, page 82, a number of authorities are cited, with which I do not intend to trouble you; but there is, on page 83, one authority I should like to cite because it is an American authority—the opinion of a writer of distinction—I mean Chancellor Kent. On page 83 there will be seen a citation from the Boston edition, the 9th edition of his Commentaries, page 1858, vol. II, p. 432:

Animals *feræ naturæ*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they are abandoned, or escape, and return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. While this qualified property continues, it is as much under protection of law as any other property, and every invasion of it is redressed in the same manner.

The difficulty in ascertaining with precision the application of the law arises
1027 from the want of some certain determinate standard or rule, by which to determine when an animal is *feræ vel domitæ naturæ*.

If an animal belongs to the class of tame animals, as, for instance, to the class of horses, sheep, or cattle, he is then clearly a subject of absolute property; but if he belongs to the class of animals which are wild by nature, and owe all their temporary docility to the dicipline of man, such as deer, fish, and several kinds of fowl, then the animal is the subject of qualified property, and which continues so long only as the tameness and dominion remain.

Then at the bottom of that page in our Counter-Case, the argument which is at the basis of our case on property is suggested, thus:

It would seem useless to multiply authorities, as there is no suggestion throughout the United States Case that, even in their own law, the rule is not laid down by Kent.

Then there follows a statement which I think is not immaterial, especially in view of some observations made by Senator Morgan, but which I merely intend to refer to and not to dwell upon: it is pointed out that the effect of the law of the United States, beginning with the law of 3rd March 1869, by which the Islands of St. Paul and St. George were declared to be a special reservation for Government, is not an affirmation of any property in the fur-seals; and it is further pointed out, on page 84, that when the lessees assumed that position from the United States, all that was given to them by their lease was "the exclusive right to engage in the business of taking fur-seals on the Islands of St. Paul and St. George in the territory of Alaska." I do not, however, in this connection pursue this subject.

Now some further authorities are referred to, in the printed Argu-
nt of Great Britain; but inasmuch as all the authorities have been
cussed by me at length, I do not think it necessary to do more than
: the Tribunal to bear in mind that there is that reference to further
horities at that place, and that there will be found what we submit
n accurate statement of the law, both as to that prevailing in the
ited States and that prevailing in Great Britain.
)n page 31 of the English Argument you will find this:

ie common law in force both in America and England as to animals *feræ naturæ*
lentical.
iis law recognizes no property in animals *feræ naturæ* until possession. Prop-
, while the animals are alive, remains only so long as this possession lasts; when
possession is lost the property is lost. The law considers that they are then wild
nals at large, and that the rights of capture revert to all alike.
ie owner of land has what is sometimes called a qualified property in wild ani-
s on the land, but this is no more than the exclusive right to take possession
le they are there, and when they leave the land that exclusive right is gone.

'here is one other American authority to be cited. I have already
erred to him, but for another purpose—I mean Professor Angell—(I
refer now to page 95 of the first volume of the Appendix to the
8 Case of Great Britain).—In his article in the "Forum", he states
the argument of the United States as plausibly as it can be put.
says:

t may be argued that, since most of the seals which are taken by the British breed
our soil in the Pribylof Islands, we have an exclusive claim to them in the sea,
at any rate a right to protect them there from extinction. But some of them
ed on Copper Island and Behring Island, both of which belong to Russia. How
t possible to maintain any claim to ownership in seals on the high seas under any
ciple of law applicable to wild animals? We can acquire no property rights in
mals *feræ naturæ* from their birth on our soil, except for the time that we hold
m in our possession. A claim by Canada to the wild ducks hatched in her terri-
y, after the birds have passed her boundary, would seem to be just as valid as
n to seals in the open sea.

Then a little lower down he says:

)n the whole, we find no good ground on which we can claim as a right the exclu-
n of foreigners from the open waters of Behring Sea for the purpose of protecting
seals.

Now I intend to supplement the authorities already referred to by
ly one or two more. I refer to the case of *Gillett v. Mason*, which is
United States case, decided in 1810, and reported in the 7th Volume
Johnson's Reports. It is on the question of bees. I cite it merely
shew that the law of the United States, as regards bees, is the same
the law of Great Britain; and, indeed, that the judgment was based
on the citation, to which reference has already been made, from
ackstone.
Now the head note in that case is this:

ees are *feræ naturæ;* and until hived and reclaimed, no property can be acquired
hem. Finding a tree on the land of another, containing a swarm of bees, and
king the tree with the initials of the finder's name, is not reclaiming the bees,
does it vest in the finder any exclusive right of property in them; nor can the
ler maintain trespass against a person for cutting down the tree and carrying
ay the bees.

In giving his judgment the learned Judge cites the opinion of Black-
one (2 Commentaries p. 392), and of Justinian, as the justification
the legal view that he takes as to property in bees.
Then, again, as regards rabbits, I refer to the case known as *Boul-
n's Case*, which is in the 5th volume of Coke's Reports, page 512:

Between Boulston and Hardy it was adjudged in the Common Pleas that if a man
kes coney-boroughs in his own land, which increase in so great number that they

destroy his neighbour's land next adjoining, his neighbours cannot have an action on the case against him who makes the said coney-boroughs; for so soon as the coneys come on his neighbour's land he may kill them, for they are *feræ naturæ*, and he who makes the coney-boroughs has no property in them, and he shall not be punished for the damage which the coneys do in which he has no property, and which the other may lawfully kill.

In other words, if he had the property in them, and kept them on his land, he would be responsible for the damage that they did; but being no man's property—being the property of the first man who kills them—and the owner having the exclusive right to kill them while on his land and no more, he is not liable for the damage that they did.

1029 The last case I intend to cite is an interesting case, which perhaps, in this very dreary and dry subject is something to say for it. It is the case of *Ibbotson* v. *Peak*, which is reported in the 34th volume of the Law Journal Reports, New Series, page 118. It was decided in 1865. The action was a very curious one: the facts are these. There were two adjoining owners. One was the Duke of Rutland, who had upon his land grouse preserves, which he took great pains (to use an expression used by my friends in their argument), to "cherish". Adjoining him, was a neighbour who was not unwilling to get some benefit from the fact of his contiguity to these same preserves, and who had resorted to the most unsportsmanlike and unneighbourly means of enticing the birds to leave the Duke of Rutland's preserves and come upon his ground; and he had done that by seeking to decoy them by putting down food in particular places contiguous to the Duke's preserves, with the result that he did induce a considerable number of the grouse to come to him.

Thereupon the gamekeeper of the Duke, not to be out-done, thought he would endeavour to deprive the unneighbourly neighbour of the advantage, and he proceeded to fire off, in the neighbourhood where this provender was put as an inducement to the grouse, guns, rockets, fireworks, and things of that kind to drive them away from the lands to which they had been so enticed, and back again to their usual ground on the Duke's preserves.

Thereupon the neighbour brought an action against the Duke's representative for injuring him by these means. The Duke in answer said, "As to so much of the plaintiff's case as alleges"—so and so—

the defendant says that before the time of the committing of the said supposed grievances in the first count mentioned, his Grace the Duke of Rutland was seised in fee of certain land abutting on and next adjoining the land of the plaintiff in the first count mentioned, and was entitled to the exclusive right of shooting, killing and taking grouse on his land; and the said Duke, before the committing of the said supposed grievances, had gone to great expense in getting up and preserving great numbers of grouse on his lands, as the plaintiff well knew; and the defendant says that just before the committing of the said supposed grievances the plaintiff fraudulently and wrongfully, and with intent to lure and entice the said grouse away from the said lands of the said Duke on to the lands of the plaintiff and to obtain for himself the benefit of the expense so incurred by the said Duke as aforesaid, laid and placed on the land of the plaintiff near to the lands of the said Duke, quantities of corn and other substances on which grouse feed, and thereby then lured and enticed the said grouse.

Thereupon he goes on to say that all he did by his fire-works was to get them away from the spot to which they had been enticed. The question was, Did an action lie? Held that an action, even in that case, lay against him. The Duke had no property in the grouse. They were only his so long as they were on his land, and he had the right to take them while on his land, and no more than a right to take them when they were on his land. And Lord Bramwell who interposed in the

1030 beginning of the argument of the case, illustrates his view of the matter by saying.

In *Chasemore v. Richards* the plaintiff was possessed of a spring underground hich supplied his well. The defendant dug a well on his land, and the plaintiff's pring in consequence dried up. The only remedy the plaintiff had was to dig his ell deeper and so retain the water if he could.

So, says Lord Bramwell, in the present case the remedy of the Duke to offer greater attractions to the grouse, and induce them to come in hat way, and because the plaintiff has done an unneighborly thing, he as got no right to frighten them away.

He says:

What is the reason given? The reason given is this: That the game which the efendant frightened away was game which the plaintiff wholly or partially got om off the Duke of Rutland's land,—say the Defendant's land—the Duke having tracted it there by providing food for it, or taking care of it, and then the plaintiff properly attempted to get it on his land by putting down some grain on his land. hen, in order that the plaintiff may not shoot the game which the Plaintiff had so tracted and in order that the plaintiff may have no inducement to go on with such nduct—for that is the only meaning of preventing him from alluring the grouse foresaid,—in order that he should be without inducement for such acts as that, the efendant did the thing complained of. It appears to me clearly that the plea is ad, because I see nothing in point of law, to prevent the plaintiff from doing that hich the plea alleges he has done. If the plaintiff has done no wrong, how can here be a justification of the defendant's act. No one can pretend for a moment hat any action would lie at the suit of the Duke against the plaintiff. The truth this: without saying anything as to the propriety of such conduct as this between entlemen and neighbours, the true remedy, I take it, where a person knows game attracted away from his land, is to offer them stronger inducements to remain.

Now I have said that we have exhaustingly and exhaustively stated the unnicipal law of these two great communities, but I have yet to trouble he Tribunal with the law of another great community. French law as to wild animals. I mean the law of France; and at some trouble, and with ome pains, we have endeavored to inform ourselves about this law; nd it will be found that, with very slight exceptions, it is essentially he same in principle as that of the United States of America and of Great Britain.

I am glad to know that there is, in the President of this Tribunal, one ho can check or correct, if any error be committed, our statement of he French law. I find as the result of this enquiry that there are ecognized three main divisions of living animals; wild animals: *Fera*, ho live in a state of natural freedom, or as the civilian expresses it *in aritate naturali.* I find that there are domestic animals, *Mansueta;* and he third class is the half-tame or reclaimed animals, *Mansuefacta*, which s an intermediate class between the other two. But I find also that he existence of that third class is not admitted universally by text riters; but it is to be added that the existence of that class is a matter of small importance, for these animals are regarded by the law in the light of domestic animals when they are on the land, that is 1031 to say, the right to take them is recognized when they are on the land; and treated as wild, or no man's property, when they are off the land.

Senator MORGAN.—Does the Government of France assert a title in any wild animals for any purpose?

Sir CHARLES RUSSELL.—I am not aware, except on the same lines I have been endeavouring to explain; but I would respectfully refer to the President as a much more reliable authority.

Now as regards domestic animals, or the animals which belong to the first class, they are dealt with by various articles of the Code; and I

do not think I need trouble the Tribunal at all to refer to that. As regards wild animals, I will give a definite reference to authorities. A wild animal in a natural state of freedom belongs to no one. It is *res nullius;* the method of acquiring a right of property over it is by taking possession; and the reference to that is Aubry and Rau, *Droit Civil*, Vol. 2, paragraph 201.

The PRESIDENT.—That is the acknowledged principle of our French law.

Sir CHARLES RUSSELL.—Yes. The things which are recognized by French law as *res nullius* include these categories: Things which can never be the private property of any one: Things such as air, light, the high sea, and so on: Things which do not actually belong to anyone, but which, by their nature, become the object of a personal appropriation by possession. Such are wild animals, the fish of the sea, and so forth. As regards the products of the sea, such as amber, coral, and so on, a distinction might be made, which is a distinction made in Italian law also: If the things are taken from the bottom of the sea or caught upon the waves, they are the property of the first taker. If, on the other hand, they are simply found on the sands, a part belongs to the finder and a part to the State. And the authority for that is Busson, "Des Établissements de Pêche", page 17.

The PRESIDENT.—The State is the legal owner of the shore, but a part of the find belongs to the finder as a general rule. The shore of the sea is considered as belonging to the State as it would to any private man.

Sir CHARLES RUSSELL.—Quite so, but as to the sea, everyone has an equal right to gather the riches which it contains, for these riches, up to the time of their being taken possession of by the individual are common to all; for which the authority is also Busson, "Des Établissements de Pêche". Then I need not refer to an account which is interesting, but not directly *ad rem*, as to restrictions which in former times existed upon the pursuit of hunting and the way in which those rights were exercised.

The PRESIDENT.—Perhaps you would kindly give us the authorities about it.

Sir CHARLES RUSSELL.—Certainly I will read the whole authority. Hunting, says in effect the Court of Cassation, includes the whole series of operations which begin with the search for any wild animal for the purpose of ultimately effecting its capture. Hunting being the means of capturing and appropriating to oneself wild animals,
1032 it follows that hunting is only the exercise of a natural right.

Nevertheless this natural right has been for a long time appropriated in France by the feudal law to the profit of the Sovereign.

It was considered as a royal right. The Nobles alone had the power to hunt, but they did not exercise it even on their own lands except by royal license.

Then a reference is made to the royal Ordinance of Louis XIV in which Articles XIV and XXVIII are as follows:

We permit all Lords, Gentlemen, and Nobles to hunt in noble fashion with dogs and birds in their forests, thickets, warrens, and plains, provided that they keep a league distance from our plesaunces for buck and *bêtes noires* to a distance of 3 leagues.

Then Article XXVIII is:

We prohibit Merchants, Artizans, Commoners, and Inhabitants of towns, boroughs, parishes, villages, hamlets, peasants and yeomen of whatever condition and quality they may be, not possessing fiefs, lordships, and *haute justice* from hunting in

any place, condition or manner, or any furred or feathered game whatever under penalty of 100*l* fine for the first time, double for the second, and for the third, to be liable to three hours in the pillory of their place of residence on market day, and banished for three years from the jurisdiction of the *maîtrise*, unless for some cause the judges can remit or diminish the penalty to prohibition.

The PRESIDENT.—The right of hunting was considered a regal right, and the Lords had it by tenure only as a derivative right.

Sir CHARLES RUSSELL.—Yes, as a seignorial right.

The PRESIDENT.—As a seignorial right; and that was all derived from the sovereign right.

Sir CHARLES RUSSELL.—Quite so.

Senator MORGAN.—If I understood it, Mr. President, you said it was a right derived from the Sovereign, and not inherent in the individual?

The PRESIDENT.—It was not inherent in the individual under our ancient law.

Sir CHARLES RUSSELL.—Quite so. It was the old feudal law, in which the King was supposed to be the source and origin, the head of the whole society—the Lord of all that was possessed, who granted out from his royal favour this, or that, or the other. That was the old original feudal idea, undoubtedly.

The PRESIDENT.—It was somewhat different from the right of property. The right of property was quite independent of any grant of the King. Feudal right was derivative, but allodial right was not derivative—the right of hunting was considered part of the power, and it was given in fee, just as the right of justice was given. You know that landlords were judges, and were entrusted with the care of judging in certain provinces and at certain times. They had the right of "mint", and several other regal rights of that sort. The right of hunting was a derivative right from the sovereign power. It was not quite the same as property.

1033 Sir CHARLES RUSSELL.—Then there is a reference to the existing Police Law of 1844, which I do not think I need trouble about. It simply says that no one shall have the right to hunt on the property of another without the consent of the proprietor or of his assigns. The right of hunting is thus accessory to property; but it must not be confounded with right over the game. The right of the chase only allows the proprietor to legally possess himself of wild animals found on his land, and so forth.

Then Monsieur Demolombe, in commenting on the general provisions of Book 3 of the Civil Code—this is in his "Traité des Successions", Volume I, sections 26 and 27—as to the different methods in which a man acquires property, puts the question, does the hunter who kills a head of game become the owner of it? This is our subject. The answer is simply, the property in the animal killed in hunting belongs to the hunter in virtue of the right of possession. This is one of the divergences from English Law, because this is not restricted to hunting upon his own land. It agrees there with the Roman Law.

This rule is perfectly clear when the animal has been killed by the hunter on his own land, or on the land of another with the permission of the proprietor. But ought this rule to be applied in the case where the hunter has killed or taken the game on the land of another without the permission of the proprietor, or in spite of his prohibition? This is a very old question, and Cujas has maintained the negative. But the contrary solution has always been generally insisted upon; and it is that which follows from the Roman Laws.

So that he adopts that view.

Then he goes on:

Pothier in our ancient law likewise maintained it (de la Propriété nº 24), and it is without any doubt the best according to our present law. The prohibition by the

proprietor against any person hunting on his land does not really change the nature of the game which is none the less always a thing *nullius;* "prohibitio ista" as Vinnius well says "conditionem animalis mutare non potest." The owner of the land cannot bring an action to recover the game since he has never been the owner of it; all he can do is to sue for damages.

That is for the trespass. Then the Law of the 3rd of May, 1844, which I have already referred to, contains nothing contrary to this principle; but it does appear to provide that in the case of hunting during the prohibited time this law deprives the hunter of the game which he has killed or taken; and, further, in reference to killing out of season, it is not in order to restore it to the proprietor of the land on which it has been killed by a third person, for, as we have seen, the law gives it on the contrary to charitable societies.

Senator MORGAN.—Confiscates it.

Sir CHARLES RUSSELL.—Yes, if it can be called confiscation.

Senator MORGAN.—That is because it is killed in violation of law.

Sir CHARLES RUSSELL.—Then the next passage which is instructive is from the book by M. Villequez, doyen de la Faculté de Droit de Dijon, "Droit du chasseur."

1034 Game at large which is not confined in an inclosed area from which it cannot escape, belongs to no one, no more to the proprietor of the land on which it is harbouring, lying or perching or through which it is passing than to any one else. It becomes the property of the first who takes possession of it even on ground where he has not the right of chase or pursuit.. This is a constant principle applied without dispute from the time of the Romans to our own days. It results from the very nature of the things. Natural law and reason alone would teach it, were it not everywhere written and acknowledged. A right in fact is not intelligible except so far as it is possible to exercise it. The exercise of the right of property consists in the use of the thing which is subject to it. The proprietor of a field uses it when he cultivates it, when he reaps it, or even when he walks over it. To use a hare which is lying there he must begin by taking it, or at least by having it in his possession in such a manner as to be its master and to prevent it from escaping. Up till that time it belongs to no one, is its own master, and often will only lose its liberty with its life, to the profit of whoever kills it for the purpose of appropriating it by taking possession.

The next clause is from Pothier *De la Propriété*, No. 57, and from the same author Demolombe, vol. XIII, No. 26.

The property which is established in wild animals by possession rests so clearly on the fact of effective possession that it is lost with that possession when the animals by escaping from us have regained their natural liberty, and have thus returned to the "negative domain" of the human race; thus differing from inanimate things and domestic animals in which we retain the property even when they are lost.

Then, upon the subject of fishing, fish of the sea and in running waters are also, as we have said, like wild animals, *res nullius.* The capture of fish is effected by means of a series of operations covered by the description of fishing. And then from the *Ordonnance sur la marine* of 1681, 5th book, title I, article 2, and also from Pothier's *De la Propriété*, No. 51, everyone can fish in the sea without permission. It is, in this sense, that one is accustomed to say sea-fishing is free; for, in other respects, it is subject to by-laws and police rules, which in the general interest, in order to prevent the destruction of the spawn and to encourage the reproduction of different kinds of fish, determine the seasons and hours during which fishing is forbidden, the method, the machines and instruments prohibited, and the size of the nets which may be used. These rules are not binding in the open sea except on the nationals whom alone the national law can follow outside their territory (Civil Code, article 3). They have no legal effect as regards foreigners, except in the limits of the territorial sea.

Then I could refer if need be, and I must refer to it in another con-
ction, though I may mention it here as it is under my eye at this
oment, to cases which are constantly occurring, where the interests of
untries separated by water or contiguous by land are concerned:
us boundary questions have arisen between France and England as
fisheries, where France has seen the utility of admitting certain
nitations and certain rights claimed by Great Britain, and Great Brit-
n, on the other hand, has seen the equity and utility of conceding to
France, and Belgium and other Powers, the same limitations,—I
35 must say something on this at some later period, probably at
greater length; but all this goes to show that these Conventions
Agreements for mutual accommodation are effecting that which
ternational law cannot effect, because it does not provide for it.
hey are outside the domain of that law; they are dealt with upon
inciples of mutual give and take and mutual convenience; and even
these cases, I need not say, the Conventions so made and the legis-
tion of the respective countries intending to give effect to these Con-
ntions only bind the respective nationals, and bind no outside Powers
d the nationals of no outside Power whatever, and, therefore, it does
t fall within the scope of international law.

Now I will only make one further reference, and that is to say that
e law as to bees is the same as that which I have been already deal-
g with and there is a case decided by the Cour d'Appel de Toulouse
late as May 1876, where the principles are laid down by that Court
strict conformity with the authorities which I have already been
ting:

When bees are in a wild state, they are *res nullius* and become the property of
e first taker. If they have taken up their abode in the hives they are susceptible
private property. The recent law of the 4th April 1889 of the Rural Code in
ticle 7 indicates in what manner the property in bees ceases when the bees located
any land abandon it.

These are the words of the law of 1889:

The proprietor of a swarm has the right to retake it, and repossess himself of it
long as he has not given up its pursuit; otherwise the swarm belongs to the
oprietor of the ground upon which it has settled.

He has the right to take it.

Senator MORGAN.—Is that a Statute?

Sir CHARLES RUSSELL.—Yes, the Rural Code of 1889.

Lord HANNEN.—There have been some decisions on that.

Sir CHARLES RUSSELL.—This decision could not have been on that;
ut it was on a similar law. This is in 1889, and it conforms to the
evious decision of the Cour d'Appel de Toulouse, delivered in 1876.

Lord HANNEN.—There is a case somewhere with reference to silk-
orms. Have you got that?

Sir CHARLES RUSSELL.—No, I have not got that case. The reasons
ven in the Cour d'Appel de Toulouse I might read.

Considering that according to the tests furnished both by principles and by juris-
udence, domestic animals are those which associate with man, live about him in
house, are nourished and bred by his care; that the bees still retain, after being
ken possession of by man, their wild nature which the Roman law recognized;
at they do not live near man and under his roof, and they are separated from his
bitation by reason of the inconvenience and danger which their proximity
volves; that the bees familiarize themselves so little with man that one is obliged
take precautions in approaching their hives and removing their honey, which the
bour of these insects has stored in cells;

Considering further that if in a certain measure the surveillance and care of the
oprietor is employed in the preservation and nourishment of the bees, that they

rely for their subsistence in taking from shrubs and flowers near the hives, and in carrying thither the substances that they have gathered.

1036 Considering also that these essential difficulties make it impossible to class bees in the category of domestic animals.

That is the short decision.

Senator MORGAN.—Was that before the statute to which you referred?

Sir CHARLES RUSSELL.—Yes I have said so. The decision was in 1876 and the Statute was passed in 1889.

Lord HANNEN.—It was a codification of the principles embodied in that decision.

Sir CHARLES RUSSELL.—Yes.

There is another decision also referred to of the Cour de Limoges to the same effect.

Mr. PHELPS.—These have not been quoted in your previous argument, and we have had no access to them or opportunity to see them.

Sir CHARLES RUSSELL.—I do not wish to say anything that would be at all irritating, but it is to be borne in mind that my learned friend Mr. Carter very early before commencing his argument deplored the loss of certain French authorities which he hoped to be able to recover or replace, and therefore my learned friend's mind, which was no doubt laboriously engaged in this matter, was addressed to the subject of French authorities, and indeed it was that which suggested to us that we should explore the same region with the result that I have put before the Court.

The PRESIDENT.—It is an argument of analogy.

Sir CHARLES RUSSELL.—Yes: I claim to have shown that the laws of France, the United States, and Great Britain, all concur; and so far as I know, but it is not safe to generalize, the municipal law of no country can be invoked in favour of the claim to property in the seals; and thus municipal law cannot be invoked in favour of this claim of the United States to property. Now I have dealt with the general propositions.

The PRESIDENT.—May I remind you with regard to what you said as to the Russian law, that the Russian law did not admit of *res nullius*.

Sir CHARLES RUSSELL.—I did say so.

The PRESIDENT.—Yes.

Sir CHARLES RUSSELL.—I do not think that contravenes the proposition I am now upon.

The PRESIDENT.—I merely remind you of what you have stated—the seal in Russia would not be *res nullius*.

Sir CHARLES RUSSELL.—The law would not give it to the proprietor of the land on which it was found. If it did not belong to the proprietor, it would belong to the State. I suppose that is the result of the Russian law.

The PRESIDENT.—What you stated this morning was quite novel to me, and I cannot form an opinion from a law I do not know.

Sir CHARLES RUSSELL.—I have seen it somewhere stated. I know that Russian law does form an exception to the general law of

1037 other countries in that regard, that nothing is said to be according to the Russian law without an owner, and if there is no private owner the State claims to be the owner. I thought it right to say that, because I had seen it, but the authority for it I do not recall.

The PRESIDENT.—It may be said that is one of the objects that are capable of appropriation.

Sir CHARLES RUSSELL.—Yes, matters which are capable of being the subjects of property; and, as regards animals *feræ naturæ*, there is

rely that right to take them and so acquire the property, and nothing re,—it may be so.

The PRESIDENT.—The fact is, we do not, either of us, know the law.

Sir CHARLES RUSSELL.—No; I do not trust myself to speak posively about it.

I am not at all sure, Sir, that it would not be a more correct thing to y of wild animals that they are *res communes* rather than *res nullius*. at may possibly be. I merely suggest it because anybody may take em. I should not like to pledge myself to any view about it.

Senator MORGAN.—They are *res*, at any rate.

Sir CHARLES RUSSELL.—They are *res*, certainly.

THE APPEAL TO INTERNATIONAL LAW.

But now, Mr. President, I have yet to deal with another view of this estion, what law is to govern this Tribunal in determining this questn. I submit that I have demonstrated that municipal law does not pport this claim, but negatives it. I have further submitted that le in things must take its root in municipal law, and I have sought illustrate that by pointing out to you what the case must be if, tead of the Pribilof Islands being the national property of the United ates, they were, as they well might be, the private property of an linary individual. I gave as an illustration yesterday the Scilly ands on the southwest coast of England, and many other islands ng the coast. Suppose that, in such a case, the private owner of those ands asserts that his right of property in the seals is attacked by lagic sealing in the adjoining ocean.

What must be his initial step? He is complaining of an invasion of s right of property in the fur-seals, by a neighbour, by a pelagic sealer m the adjoining coast. He sues him in trespass; he sues him in over; he sues him in any form of action he chooses. The first step he ust take, the first position he must lay down clearly and distinctly, is at according to the law of the place he has a title to the thing which claims, and his right to which he says has been invaded. Can there any difference—is there any ground conceivable for treating the estion in a different way, because the United States happen to be the owners of the sovereignty over the Islands and have given to 638 their lessees the right to take these seals on the Islands? Is the question any different because the claimant here is the United ates, from what it would be if the lessees were the claimants: or if a ivate person, being the owner of the Islands, was the claimant? I y it is impossible that property should exist in one case, and not ist in the other, or that property should be non-existent in one case it is not also non-existent in the other.

But then my learned friend says in effect:—Failing municipal law, riving no authority from municipal law for my position, yet there is other law which gives me property, which gives me the right I claim, d which is the law in this matter to determine the right of these rties, and that is international law.

Let us see if my friend is well founded there. What must he do; ust he not in order to derive support from international law establh—for the *onus* is upon him—that international law has laid down a le or a principle treating fur-seals in a way different from the mode which municipal law regards them, as animals *feræ naturæ*? or in ier words, must he not support the proposition that, while by intertional law, all nations on the high sea are equal and have a right to

take from the sea what they can get from the sea, that internatio law has engrafted upon that general principle an exception wh excludes fur-seals or any similar creature from that generally admit right?

Surely I am right in affirming that one or both of those propositi must be established by my learned friend. Has he made an atte to support either of them by reference to international law? I sub he has not; and here again I must recur to what I think must be fr time to time, if I may say it with respect, borne in mind by the Tribu as to what international law really is. I have already endeavoured explain that nothing can be considered international law as to wh it cannot affirmatively be shown that the consent of civilized nati has been given; and that nothing short of an affirmative answer to question *placuitne gentibus*, applied to any proposition, will satisfy test of what international law is. My learned friend says internatio law, moral law, natural law, are all practically interchangeable wor meaning the same thing. I would like to examine this briefly fo moment or two.

It is quite true that there are some writers of distinction who r to natural law as the basis and source of international law, and wh language would seem to show that they regarded natural law as same thing. Puffendorf is the most prominent amongst these; such writers as Bynkershoek and Wolfe have an entirely different vi Heffter, with whom I have no doubt the President is entirely famil speaks of international law as founded on necessity developed by mor

Calvo recognizes the idea of general justice as modifying for the c mon good the relations of States; but he himself prefers to rest in national law upon the principles defined by various Treaties, and ru natural and logical, to be deduced from many ingredients 1039 many cases, carried into practice and generally recognized; finally sums it up in the phrase "la jurisprudence consacré la coutume."

There are two very acute criticisms upon this subject to which I sho like to draw the attention of the Tribunal. One is the criticism of B tham, cited, and cited with approval, by Ortolan in his "La Diplom de la Mer". I am citing from the second edition of 1853. He cite passage from Bentham of a very incisive character, as nearly all of B tham's were, in which he is speaking of natural law, and natural ri as springing from natural law. He says:

> Natural right is often employed in a sense opposed to law, as when it is said, example, that law cannot be opposed to natural right, the word "right" is emplo in a sense superior to law: a right is recognized which attacks law, upsets, annuls it. In this sense which is antagonistic to law, the word "droit" is the gr est enemy of reason, and the most terrible destroyer of governments. We can reason with fanatics armed with a natural right, which each one understands as pleases, applies it as it suits him, of which he will yield nothing, withdraw nothi which is inflexible at the same time that it is unintelligible, which is consecrate his eyes like a dogma, and which he cannot discard without a cry. Instead of ex ining laws by their results, instead of judging them to be good or bad, they consi them with regard to their relation to this so called natural right. That is to say t substitute for the reason of experience all the chimeras of their own imagination

Another critic, a very able and acute one, Austin, speaks to the sa effect. I am now reading from a book which has certainly had enorm influence on the mind of England, and the value of which I think h been almost universally recognized. I mean his "Province of Jurisd tion Determined": at volume I page 222, he says:

> Grotius, Puffendorf and other writers on the so-called law of nations have fall into a similar confusion of ideas.

What that confusion is you will find from the context.

They have confounded positive international morality, or the rules which actually btain amongst civilized nations in their mutual intercourse, with their own vague onceptions of international morality as it ought to be, with that indeterminate somehing which they conceived it would be if it conformed to that indeterminate omething which they called the law of nature. Prof. Von Martens of Gottingen who ied only a few years ago is actually the first of the writers on the law of nations ho has seized this distinction with a firm grasp, the first who has distinguished the ules which ought to be received in the intercourse of nations or which would be eceived if they conformed to an assumed standard of whatever kind, from those hich *are* so received, endeavoured to collect from the practice of civilized communiies what are the rules actually recognized and acted upon by them, and gave to these ules the name of positive international law.

Now, lastly, an American author, Mr. Woolsey. This is in the original ext. This is in fact the first edition. It is the introductory chapter, age 13 of the first edition. He says.

Thus Puffendorf commits the faults of failing to distinguish sufficiently between atural justice and the law of nations, of spinning the web of a system out of his wn brain, as if he were the legislator of the world, and of neglecting to inform us what the world actually holds the law to be, by which nations regulate their course.

1040 But now, apart from these weighty authorities, am I not justified in saying as to the natural law what I have already intimated in the previous part of my argument as to the moral law, that it is only so much of the rules of morals or the rules of the law of nature, as have received the *imprimatur* of nations—evidenced by the assent of nations expressed or implied—only so much as has been taken up by that consent into the body of international law is in truth international law.

I took occasion this morning to put to my learned friends the question argumentatively, and I now repeat it; can they refer to any controversy between nations which has ever been settled by a reference either to natural law direct, or to a supposed law of morals? I think they will find it difficult to find any such case.

But now I have to meet this suggestion of my learned friend, namely, that although he may be wrong in saying that natural and moral law are the same as international law, yet that although they may not *per se* be international law unless and until consent of civilized nations has been given, yet—and I think he put this affirmatively in his argument—yet that you are to presume that nations have assented as part of international law to all principles of morals, and all principles to be drawn from the law of nature, until you can show that they have dissented.

I first ask the question: Is there any authority for this statement that any such thing is to be presumed? I have already pointed out that, so far as the law of nature is concerned, it could give us no help whatever upon the question of property: for that the true view of all law, properly so called, municipal as well as international, is that it has substituted rules of right and equity for claims of property which originally, according to natural law, rested for their ultimate sanction upon force and upon force alone.

But, let me ask again, where are we to find these laws of nature? What nations have agreed upon them? Where are they codified? Where are they to be found? "What is the book, edition and page" to which reference has been made? No satisfactory answers can be given to these questions.

Again, what are the rules and laws of morality? Upon what points where they touch modern society, regarded either municipally or internationally, do societies of men, or do nations, agree as to them? Is it

not true to say that opinion, which is matured upon a particular p touching morals in one nation, is in a state of flux and uncertainty another nation, even upon points where there is a general consensu reprobating a particular course of conduct? I gave an illustration other day—and what other illustration can be stronger—the slave tra yet it cannot be affirmed that the slave trade is yet relegated by in national law to the same category as piracy, or carries with it the sa sanction. Or, again, take the illustration which the argument of learned friends here supplies. According to their contention, it is—

the United States have made it, as far as municipal law can m
1041 it,—a crime against the law of nature or of morality, or of b
to kill a female seal. Is that a rule of morality which prevails world over? Have nations agreed in regarding this as a crime? I international law or a congress of international statesmen ever sugges that to kill a female of any species of animals, wild or domestic, aye even a gravid female—very reprehensible and regrettable, it may b was to be regarded as an international crime?

I have said before that there are certain great principles of mo which have been used to test the relative value of conflicting usage tendencies of opinion or doctrine, to give formal expression to grow custom, to support fresh theories placed before the world for consid tion and acceptance; but no attempt can be made to directly imp such principles upon States as a direct obligation until the consen of nations has first assimilated them as part of the international l

If I am right in this—and I submit that I am—the conclusion is t it is not a question of presuming assent to ideas of international l or morality, or anything else, as to which civilized nations, just civilized men, take different, diverging views; but that to consti international law, assent has to be affirmatively shown.

Finally, in this connection, I have to submit that modern inte tional law has long passed the stage at which an appeal to any va general principles can afford any safe, certain resting place or gr at all. It is now, and it has long been, a body of derivative p ciples and concrete rules, formed by the action and re-action of e other, of custom, moral feeling, considerations of convenience. I only capable of modification and extension either by the slow gro of fresh customs, under the influence of these other factors, morals convenience, or by general express agreement amongst nations,—r ters involving new principles or new rules, or fresh, unrecognized p tices. No speedy way exists of changing the concrete rules of exis law otherwise than by the general agreement of civilized States; to nothing else than these concrete rules is obedience due.

I concede that these concrete rules do not cover all cases. Prob the law never will be found to cover all possible cases; but the la supplemented by treaty, by agreement between particular States; you are in this instance, in discharge of the important functions w you have assumed, standing in the place of these parties, in connec with the branch of the question which I have not yet approac But now you are to declare as regards the branch with which I am d ing, what are the rights, legal rights, according to existing law, of parties, not looking beyond that law, until you come to the sec branch of the question; then indeed you are to say for the parties w they would have said for themselves had they entered into an agreen to settle the differences existing between them.

Senator MORGAN.—Is it to be determined according to existing in national law, or existing municipal law, or both?

042 Sir CHARLES RUSSELL.—I have already said that in my judgment international law, as regards property and things, has othing to do with the questions in this case.

Lord HANNEN.—That is to say, international law does not speak on ie subject?

Sir CHARLES RUSSELL.—It does not speak on the subject.

Senator MORGAN.—The Treaty does not refer to the subject as either unicipal or international, or to any particular law, municipal or interational.

Sir CHARLES RUSSELL.—Quite true, sir. It speaks, however, of ights which are to be ascertained by reference to law, as legal rights. have dealt with the question of municipal law. I have attempted to how that there is no such right according to municipal law. I have lso attempted to show—I hope you will think I have succeeded in howing—that there is no such right according to international law; but have not exhausted that subject.

Senator MORGAN.—I have not yet heard any reference by anybody o writings in which we are to find either the general principles or the oncrete rules by which we are to be guided in the determination of what is the international law, or how much of it applies to this case.

Sir CHARLES RUSSELL.—You will have the opportunity, Sir, before this case is over, of being referred to them.

Senator MORGAN.—I hope so.

Lord HANNEN.—Will you allow me to put a question to you?

Sir CHARLES RUSSELL.—If you please, my Lord.

Lord HANNEN.—You have argued that the municipal law of the United States has not made this property in the United States. Suppose there had been a law of the United States enacting that the seals on the Pribilof Islands should be the property of the State, would that have made any difference in the argument?

Sir CHARLES RUSSELL.—None at all, outside the territorial limits. Of course, as regards their own nationals, it would.

Senator MORGAN.—Outside the territorial limits?

Sir CHARLES RUSSELL.—Certainly.

The Tribunal then adjourned until Thursday, May 25, 1893, at 11.30 o'clock A. M.

TWENTY-SEVENTH DAY, MAY 25TH, 1893.

Sir CHARLES RUSSELL.—Mr. President, I am now able to fortify by authority the correctness of the answer which I gave yesterday to the question you were good enough to address to me upon the question of how far the right of the King as to property in swans or in royal fish extended, and whether it extended, or was asserted to exist, beyond the territorial limits. The authority that I refer to is recognized as the principal authority upon the subject,—Chitty on the "Prerogatives of the Crown"—and I am reading from the edition published in 1820, page 144. It deals both with the question of royal fish and royal birds, swans. This is the passage:

The King has no general property in fish. It would be superfluous to specify and particularly designate whales and sturgeons alone, as being royal fish, if all fish were the King's property. *Exceptio probat regulam.* With respect however to whales and sturgeons, it was always a doctrine of the common law that they belong to the King. And by the statute *de Prerogativâ Regis,* it is declared that the King shall have whales and sturgeons taken in the sea or elsewhere, within the realm, except in certain places privileged by the King. But to give the Crown a right to such fish they must be taken within the seas parcel of the dominions and Crown of England, or in creeks or arms thereof; for if taken in the wide seas or out of the precinct of the seas subject to the Crown of England, they belong to the taker. A subject may possess this royal perquisite; first, by grant; secondly, by prescription within the shore, between the high water and low water mark, or in a certain *districtus maris,* or in a port, creek, or arm of the sea; and this may be had in gross or as appurtenant to an honour, manor or hundred.

Under this head may also be mentioned the right of the King to *swans,* being inhabitants of rivers. By the statute 22 Edward IV, chapter 6, "no person other than the son of the King shall have any mark or game of swans, except he have lands of freehold to the yearly value of five marks; and if any person not having lands to the said yearly value shall have any such mark or game, it shall be lawful to any of the King's subjects having lands to the said value, to seize the swans as forfeits, whereof the King shall have one half and he that shall seize the other". A subject may, however, be entitled to swans; first, when they are tame; in which case he has exactly the same property in them as he has in any other tame animal; secondly, by a grant of swan mark from the King; in which case all the swans marked with such mark shall be the subject's, wheresoever they fly; and, thirdly, a subject may claim a property in swans *ratione privilegii,* as if the King grant to a subject the game of wild swan in a river.

That I think answers the question you were good enough to address to me. Blackstone in his Commentaries, (Stephen's Edition, page 2), states the law to the same effect. I need not trouble the Tribunal by reading it. Indeed one sees at once that in the nature of things it must be so, because once outside the territorial jurisdiction of the State those
1044 who owe no allegiance to that State owe no respect to any rights, regalia or otherwise, which depend upon its laws. Of course the State might make any law to affect its own subjects, but as regards foreigners outside the realm it has no such right.

Lord HANNEN.—If a royal swan at large in the country where the King had the right to swans escaped to another country where the other King had the same right to swans at large, which King would the swan belong to?

Sir CHARLES RUSSELL.—Quite so, my Lord. For myself I should be prepared to back the right of the King in whose territory it was found.

The PRESIDENT.—Well Sir Charles I thank you very much for the explanation. It has been very useful to me at any rate. I believe the law is the same law that formerly prevailed in France under the feudal system, by which the right of chase and hunting was derived from the regalian right; and I believe the regalian right was exactly the same as that defined in the law of England which you have just read.

Sir CHARLES RUSSELL.—This subject was mentioned yesterday at an advanced stage of our proceedings, and it may not be without interest to say that the discussion reached Ottawa, the seat of Government in Canada, in time to be digested there; and this morning Mr. Tupper received a telegram which I might be permitted to read, as a matter of some interest. An erudite gentleman, Mr. Griffin, telepraphs this:

Edward I of England, on knighting the Prince of Wales, swore to God on the swan that he would conquer Scotland. The swan was the heraldic sign for God, the Virgin, and Ladylove for all Knights. See Walter Scott's history of Scotland Volume 8, and also Brewer's Historical Handbook, page 861.

Now, Mr. President, I come to the last ground on which the pretensions of the United States are based in argument, namely the ground that pelagic sealing interferes with a legal right in the industry, as it has been called, said to be carried on on the Pribilof Islands; but before I call attention to the way in which this proposition is put by my learned and ingenious friend, Mr. Phelps, who has specially taken this proposition under his protection, I should like to remind the Tribunal of the hypothesis on which this question is to be considered. We are away from the question of property in the individual seals: we are away from the question of property in the seal herd. We are away also from the question of any exclusive right in the United States or the lessees of the islands, to kill the seals, or to take the seals, or to prevent others from taking the seals in the high sea, or in a given area of the sea.

Therefore the proposition is that, although there is no such exclusive right, and no such property either in the individual seal or in the seals collectively, yet there is a right to complain, as of a legal wrong, of the fact that seals are killed in the high sea, whereby they are probably prevented from reaching the island. That is the proposition. Now I have to remind the Tribunal that what has to be established in
1045 this connection is that sealing on the high sea is an invasion of some legal right connected with the industry on the Islands. I use the phrase "industry" for brevity. I shall describe presently what it is, and consider whether it deserves that appellation.

Now that is the broad proposition, which, stated in untechnical language, may be put thus: that if a nation has an industry on its shores which depends upon the resort to those shores of certain wild animals to take which such nation has no exclusive right, and in which it has no property, if it can nevertheless prevent the killing of such animals on the high seas by another nation, if such killing prevents the animals reaching the island and so interfering with the industry.

I shall have to point out the far-reaching consequences of such a proposition as that: consequences which I think if applied to the interests and actions of the United States authorities themselves upon the eastern shores of America, will be found to be exceedingly awkward for them. But I postpone for the moment the illustrations upon that subject which I intend to submit.

I will ask the Tribunal to turn to the argument of my learned friend Mr. Phelps as it is set out in the printed book. I do not refer to it for the purpose of going through it page by page. I have stated the main proposition which is laid down in it, but there are certain statements incidentally made in the course of that argument which I cannot pass without some notice. The first of these is on page 132. It is the sentence which runs thus:

Examination of Mr. Phelps' argument.

The complete right of property in the Government while the animals are upon the shore or are within the cannon shot range which marks the line of territorial waters cannot be denied.

This the Tribunal will see is not relevant to the point as to the industry apart from property; but I cannot pass it by without pointing out, as I have already done in relation to Mr. Coudert's argument, and as I have already done in relation to Mr. Carter's argument (though it did not appear there so prominently as in Mr. Coudert's), that there is here, as it seems to me, a distinct misstatement of the law.

There is *no* complete property while the animals are upon the shore, or within cannon-shot at all! The only right that exists is the right upon which I have already, I am afraid with painful reiteration, again and again insisted—the simple right, *ratione soli:* the right to capture, the right to kill, the right thereby to take possession; but there is no complete right of property; and therefore there is this fundamental error, as I conceive, at the basis of the whole of that argument as to property. To that point, however, I am not again going to refer.

On page 134 again, at the bottom of the page, is another misstatement, as I conceive it to be, which I wish to correct.

The whole herd owes its existence, not merely to the care and protection, but to the forbearance of the United States Government within its exclusive jurisdiction.

1046 Now I wish simply to say that we know that that fact is not correct. If the United States had nobody there the seals would be there; if the islands were no man's land, the seals would be there—they would be there all the more because of the absence of man or human interference; and the very regulations which Mr. Coudert described, by which dogs were forbidden, lest their barking should disturb the seals or frighten them, or keep them away—the very remoteness of human dwelling from the places of the seals—the fact that even smoking is forbidden lest it should frighten away the seals, their sense of smell being so acute—all these things go to show that it is an entire mistake on the part of the United States to suggest that the herd *owes its existence* to them. The herd would be there all the more if they were not there; and if they even attempted artificially to do something to induce them to go there it would have a repelling effect, and not an inducing effect; and all they do is the one thing which I have again and again referred to, namely, that for their own uses, and for their own purposes, they prevent trespassers raiding on the island.

I pass on to the next page, the top of page 135. I do not dwell upon it, but there is this statement of Mr. Phelps:

While the seals are upon United States territory during the season of reproduction and nurture, that Government might easily destroy the herd by killing them all, at a considerable immediate profit. From such a slaughter it is not bound to refrain.

It conflicts with the contention of my friend Mr. Carter, and I leave them to settle their differences upon this point between themselves, venturing at the same time to express my preference for the law as laid down by Mr. Phelps. I think he is perfectly right in saying that the

United States may legally, if they can and choose, kill all the seals that come to the land; that there is no law which prevents such a slaughter; that they are not in any way bound to refrain.

Now on page 136 we come to the enunciation of a precise and definite proposition. The second sentence from the top proceeds thus:

The case of the United States has thus far proceeded upon the ground of a national property in the seal herd itself. Let it now be assumed for the purposes of the argument, that no such right of property is to be admitted, and that the seals are to be regarded, outside of territorial waters, as *feræ naturæ* in the full sense of that term. Let them be likened,—

My friend is logical, and does not shrink from this inevitable result;

Let them be likened, if that be possible, to the fish whose birthplace and home are in the open sea, and which only approach the shores for the purpose of food at certain seasons, in such numbers as to render the fishing there productive.

That is my friend's proposition; and then he proceeds to argue that, under such circumstances, there is an industry, the legal right to which is invaded (because of course, that is what he must affirm), by sealing on the high seas. To that proposition, of course, I must come back.

1047 Now, on page 138, in the third sentence from the top, the character of pelagic sealing is referred to. I have already dealt with it, and do not recur to it; but, in the last sentence, he refers to the existence, in civilized countries, of laws (during the breeding season), protective of wild animals; in other words, he refers to the game laws.

Now, I must point out—I think I have already done so more than once, and, therefore, I will not dwell upon it,—I must point out that there could be nothing more significant to show that there is no property in game than the very existence of those game laws. The law steps in, and, in the interests of all who have a right to attempt to capture game, says that, during certain seasons, no attempt at capture shall be made. It in no sense affects property,—does not pretend to affect property. It simply says that that general right of taking animals *feræ naturæ*,—which is the equal right of all mankind, of all the subjects of the realm, with the difference, only, that there is greater opportunity for exercising the right where a man is the owner of land,—shall not be exercised during certain seasons of the year, shortly called "close time".

Now, at the bottom of page 139, my friend states what he calls the "inevitable conclusion" from the facts that he has mentioned.

The inevitable conclusion from these facts is, that there is an absolute necessity for the repression of killing seals in the water *in the seas near the Pribilof Islands*, if the herd is to be preserved from extinction. No middle course is practicable consistently with its preservation.

I do not discuss that point in this connection. My friends have thought it right to mix up the two things,—claims of property right and Regulations. I do not. That is an assertion which my friend will be entitled to urge with such force as belongs to it when the question of Regulations is being discussed by him. It is not relevant to the question of property.

Then, on page 149, in the last sentence, there is a statement in these words.

Such was the view of the United States Supreme Court in the Sayward Case, in respect to the operation of the Acts of Congress before referred to, for the protection of the seal in Behring Sea. In that case a Canadian vessel had been captured on the high sea by a United States cruiser, and condemned by decree of the United States District court, for violation of the regulations prescribed in those acts; and

it was claimed by the owners that the capture was unjustifiable, as being an atte to give effect to a municipal statute outside the municipal jurisdiction. The c was dismissed because it was not properly before the court. But in the opinio is intimated that if it had been necessary to decide the question the capture wo have been regarded as an executive act in defense of national interests, and not the enforcement of a statute beyond the limits of its effect.

I have already read the judgment to the Court.

Mr. PHELPS.—Perhaps I might say that the number of the Volu in which the case is to be found is misquoted by a printer's error. P haps, Sir Charles, you have noticed that.

1048 Sir CHARLES RUSSELL.—I have, thank you,—143 is the rig Volume.

Mr. PHELPS.—Yes.

Sir CHARLES RUSSELL.—I have read that case, and I beg to s that this statement, as I read that case, is quite incorrect—in fact, o of the Judges is here, and he will no doubt tell the Court; but we ha the authentic record. It would indeed be a very extraordinary thing the Court had attempted to say any such thing. It would indeed an extraordinary thing for the Judges of the Supreme Court, or inde of any Court, under the circumstances in which the matter was p sented to them, to have attempted to express an opinion upon weighty a subject which was not before them, because, when I was d cussing the action of the United States Government in relation to t seizures, I pointed to the judgment of the Court condemning the sl and imprisoning the men: and I pointed to the argument of the Solici General to the United States, Mr. Taft, in the Supreme Court of Wa ington: and I showed how the case was put on *one* ground and ground only; namely that of exclusive jurisdiction based upon t territorial effect given to the municipal Statute. There was no s gestion in the libel in the case, or in any part of the record before Court, of the justification now suggested for the seizures as an exe tive act of self-preservation or self-defence; and therefore it would h been indeed an amazing thing if Judges of the eminence and posit of those learned Judges had stepped aside from the case presented them to express or intimate in the faintest degree an opinion on a po which was not before them, or argued before them, or even sugges before them.

The PRESIDENT.—Perhaps you might read us the passage from t opinion.

Sir CHARLES RUSSELL.—If my learned friends will kindly giv to me, I will read it at once.

Mr. PHELPS.—We have not got it here this morning.

We will bring the volume of the Supreme Court, N° 143.

Sir CHARLES RUSSELL.—I read the case with some care, and I fo no such thing in the judgment. It is conceivable that I may have o looked some passage in it, but my friend Sir Richard Webster has r it as well as myself, and we think there is no warrant for that statem at all.

Lord HANNEN.—If it were, it would be only what we call *obiter di*

Sir CHARLES RUSSELL.—There is not even that.

Mr. PHELPS.—That is all I claim for it.

Sir CHARLES RUSSELL.—I should have referred to it if it l existed, but I do not find even an *obiter dictum.*

The PRESIDENT.—If we can have the proper wording of that opini it would be better—at a later stage perhaps.

Sir CHARLES RUSSELL.—Yes, I should be glad.—But as Lord H nen has been good enough to intimate (and Mr. Justice Harlan I

sure will recognize the accuracy of it), as that case was presented
1049 to the Supreme Court, it would not be *ad rem* for them to express any opinion of that kind at all. Judges sometimes do, no doubt, express opinions away from the point before them, and those are called, and sometimes contemptuously called *obiter dicta*—they are beside the question; they are quite away from the point; they are not necessary for the decision of the case. They, therefore, have more or less authority, according to the more or less important character of the Judge who pronounces them; but they are not cited as authorities, unless it is a judicial pronouncement on a matter in which it was relevant to the judgment of the Court that the opinion of the Court should be expressed.

The PRESIDENT.—As we have not the case of the *Sayward* before us we do not care if they are *ad rem* as to the "Sayward" Case; but they may be of interest to us as being an important opinion—a weighty opinion.

Sir CHARLES RUSSELL.—I do not at all mean to undervalue the opinion of any Judge of eminence or position—what I meant to say was, that it is no authority.

The PRESIDENT.—No, it is no judicial authority.

Sir CHARLES RUSSELL.—I conceive it to be difficult to suppose that there will be found to be even an *obiter dictum*, because, as I have said, of the argument of Mr. Taft, which I read pretty fully to the Court.

Mr. PHELPS.—I was wrong in supposing that we had not got the book here. There is a book here containing the opinion: I was not aware of it.

Sir CHARLES RUSSELL.—Which is the passage?

Mr. PHELPS.—The passage is one of some length.

It is *here* [indicating].

Sir CHARLES RUSSELL.—I will read it at once with pleasure.

The PRESIDENT.—Perhaps Mr. Phelps will be kind enough to read to us the part which he deems important.

Sir CHARLES RUSSELL.—What is the book?

Mr. PHELPS.—It is a collection of pamphlets, and it contains the opinion of Chief Justice Fuller.

Sir CHARLES RUSSELL.—I want the report.

Mr. PHELPS.—This is the whole report, I am quite sure of it. It is usual to quote from this in Washington, and it is a pamphlet issued by the office.

Sir CHARLES RUSSELL.—Perhaps you will kindly show it to my friend, Sir Richard Webster.

[Mr. Phelps handed the book to Sir Richard Webster.]

Sir CHARLES RUSSELL.—The volume of the report is 143.

The PRESIDENT.—Sir Charles, if you think it material it can be got a little later.

Sir CHARLES RUSSELL.—I do not think it the least material.

The PRESIDENT.—Perhaps you might reserve it for the afternoon.

Sir CHARLES RUSSELL.—Yes, except that my friend thought
1050 he could put his hand on the passage.—I was willing to read it at the moment.

The PRESIDENT.—Rather than read it in a hurry we had better wait until the afternoon.

Mr. PHELPS.—If my friend will excuse me, we have marked the passage, which occupies several pages in the opinion of chief Justice Fuller, which I shall contend more than bear out the statement that I have made in the argument, that although unnecessary to the decision

of the case, which went off as I have stated on other grounds, it di intimate an opinion to the effect stated in my argument. I hav marked the passage for the use of my friend. I supposed it was n here, but I found it was.

The PRESIDENT.—Perhaps you will prefer to keep the reading of th passage for your own argument.

Mr. PHELPS.—Yes, unless my friends wish to read it for their ow purposes.

Sir CHARLES RUSSELL.—I am perfectly willing to read it.

Mr. PHELPS.—I do not ask them to read it.

Sir CHARLES RUSSELL.—I care not; but it is not necessary for r to stop at this moment.

The PRESIDENT.—If it is not necessary to stop for the moment pe haps you will leave Mr. Phelps to refer to it, and if he will be kir enough to refer to it in his argument, we shall be glad.

Lord HANNEN.—Have you not read it?

Sir CHARLES RUSSELL.—I had thought I read all, my Lord, that ha any bearing on the question—I read from the report that was given t us—the report of Chief Justice Fuller's judgment.

Mr. Justice HARLAN.—I have no doubt the document you have the is a correct report of the opinion. I thought you had the authority.

Sir CHARLES RUSSELL.—That is how I read it.

Mr. Justice HARLAN.—I have no doubt it is accurate.

Sir CHARLES RUSSELL.—I can find nothing to that effect: that i all I can say.

Sir JOHN THOMPSON.—It strikes me, Sir Charles, that perhaps th difference is in the interpretation of the judgment of the Court—not c the argument of Mr. Phelps as contained in this book. Do you contro vert the version given by Mr. Phelps in this argument because yo conceive the solution to be a statement that the seizure of these ves sels was an executive act done in defence of the property in the fu seals, for if that is your interpretation of Mr. Phelps' argument, m recollection of the "Sayward" case is that the judgment of the Cou did not justify that, but that the judgment of the court did establis this position, in so far as it could establish anything by a dictum—tha what had been done in relation to the seizures of these vessels was a executive act.

Sir CHARLES RUSSELL.—Clearly so.

Sir JOHN THOMPSON.—Done in pursuance of an interpretation b the Executive of its property rights; and therefore, the judicial branc of the Government would not interfere with this interpretatio

1051 Sir CHARLES RUSSELL.—I am very much obliged to Sir Joh Thompson for this interposition, because of course my whol argument goes to show that the condemnation of these ships was base on the executive action of the United States invoking their municip law, and alleging that the extent of that municipal law, territoriall regarded, embraced the place where the ships were seized: and tha therefore they were subject to municipal law, which exacted a certai penalty for being engaged there in sealing. But that is not the prop sition which my learned friend has stated here—nothing like it.

The PRESIDENT.—Mr. Phelps in his argument does not refer to th judgment. He refers to the opinion. He says: "In the *opinion* it intimated".

Sir CHARLES RUSSELL.—That means the judgment, Sir.

Mr. Justice HARLAN.—No.

Sir CHARLES RUSSELL.—What does it mean then?

Mr. Justice HARLAN.—The judgment of the Court is something different from the opinion of the Court.

Lord HANNEN.—But when you speak of the *opinion* of the Court that commonly, with us, means the judgment.

Sir RICHARD WEBSTER.—The reasoned judgment.

Mr. Justice HARLAN.—It is not always the case in America. An opinion is often separate from a judgment, but as a general rule you find, in the opinion, all that is essential to the formal judgment. That is added as a record of the Court, and you refer to the opinion for the purpose of interpreting the mind of the Court on the question submitted.

Sir CHARLES RUSSELL.—The matter stands in America, and in England, upon precisely the same ground. A judgment, properly so called, is the result of the opinion arrived at by the Court.

Lord HANNEN.—And is a formal thing, drawn up by some officer of the Court.

Sir CHARLES RUSSELL.—Yes: "Judgment for the Plaintiff"; "Judgment for the Defendant"—that, technically, is the judgment; but the *opinion* is the reasoning of the Court upon which the technical judgment is based, and that opinion is called, in England, the *judgment* of the Court, and is cited as the judgment of the Court, and I think it is the same in America.

The PRESIDENT.—Is it considered to have the same authority as the judgment itself?—That is, in France, would it not be what we call *Les Considerants?*

What you call the "opinion" that precedes the judgment and justifies the judgment, is of no judicial authority; it is merely a moral authority.

Lord HANNEN.—It is, that the Court for the reasons given, has delivered such a judgment.

Sir CHARLES RUSSELL.—May I point out the difference Mr. President? The mere judgment, (if it were to be restricted to the technical verdict for the plaintiff, or judgment for the plaintiff, or judgment for the defendant), would be no authority at all except as between
1052 those two litigants; it is the *opinion* or the reasons, upon which that result has been arrived at, which is the authority cited for the guidance of future Courts of co-ordinate jurisdiction; and, if it be the judgment of a Superior Court, for the control of Courts of inferior jurisdiction.

Mr. Justice HARLAN.—The opinion is the authority—is a precedent in future cases, according to the inquiry whether the Court in so talking kept within the case? That is the point.

Sir CHARLES RUSSELL.—I quite agree.

Lord HANNEN.—Whatever leads up to the judgment is properly referred to as part of the opinion which is binding in the future; that which does not lead up to it, is not referred to as binding, but is simply, (to use a phrase which has been already used) the *obiter dicta.*

Mr. PHELPS.—If my friend will allow me it may be well that the Tribunal should understand precisely what I have undertaken to say in my argument.

Sir CHARLES RUSSELL.—To what page do you refer?

Mr. PHELPS.—The last words on page 149. Referring to the "Sayward" case I say:

In that case a Canadian vessel had been captured on the high sea by a United States cruiser—

Sir CHARLES RUSSELL.—I read the whole of it.

Mr. PHELPS:

by a United States cruiser and condemned by decree of the United States District Court for violation of the regulations prescribed in those acts; and it was claimed by the owners that the capture was unjustifiable as being an attempt to give effect to a municipal statute outside the municipal jurisdiction. The case was dismissed because it was not properly before the Court. But in the opinion it is intimated that if it had been necessary to decide the question, the capture would have been regarded as an executive act in defence of national interest and not as the enforcement of a statute beyond the limits of its effect.

Now if my learned friend will take the trouble to read the passage in the opinion which I have just marked and handed to Sir Richard Webster, he will find that I have correctly stated the intimation of the Court, as contained in the opinion, on the main question by which it was able to dispose of the case.

The PRESIDENT.—Do you mean to say that the passage you have mentioned implies that the act of the Executive would have been justified?

Mr. PHELPS.—No: it implies, in my judgment, that the Court would have held, that being an executive act it was not subject to judicial inquiry.

Sir CHARLES RUSSELL.—Oh!

Mr. PHELPS.—Not that they would have undertaken to decide as between Nations the diplomatic question, but that so far as the judicial question was concerned the judgment of the Court below would have been affirmed upon the merits, if the merits had been decided.

The PRESIDENT.—But Mr. Phelps, in your Constitution I believe the acts of the Executive come under the judicial power?

1053 Mr. PHELPS.—Not as to foreign Nations. Sometimes, as between the Executive and the citizens, they are subject to review by the Courts; but, as between the Government and a foreign Nation, the judicial power has nothing whatever to do with questions of that sort.

The PRESIDENT.—If the Executive does wrong, other foreign Nations appeal to the judicial power,—is that what you mean?

Mr. PHELPS.—If the Executive does wrong,—it is hardly for me to argue it at this time,—it is a matter for adjustment between the two Governments.

The PRESIDENT.—I must say that somewhat alters my own view about what was the action of your Constitution.

Sir CHARLES RUSSELL.—The President will see that that is a very different statement from the statement in the Case, because the statement in the Case is that there was an intimation by the Court, if it had been necessary to decide it, that the capture would have been regarded as an executive act in defence of national interests. I respectfully say that no such opinion is intimated.

My learned friend has now read the book which Mr. Phelps was good enough to hand him, and which is exactly, my learned friend says *verbatim*, the same as the judgment I read to you. I have now got it before me; and I will read the passage.

Before I read it, may I point out what the statement of my learned friend now is, as to which I agree? What he says is this, that the Legislature of the United States having by their Statute assumed territorial jurisdiction over a certain area of the sea, and having by the executive action put that Statute into operation, the Judicial Tribunal would not go behind what the Executive had done and what the Legislature had done, but would recognize the fact that they had claimed

de facto territorial dominion and no more. That is clear from the passage I read.

May I read it again? This is on page 16 of what I think is a regular Report, and *verbatim* the same as the passage my learned friend referred to:

If we assume that the record shows the locality of the alleged offence and seizure as stated, it also shows that officers of the United States, acting under the orders of their Government, seized this vessel engaged in catching seal and took her into the nearest port; and that the Law Officers of the Government libelled her and proceeded against her for the violation of the laws of the United States in the District Court, resulting in her condemnation. How did it happen that the officers received such orders? It must be admitted that they were given in the assertion, on the part of this Government of territorial jurisdiction over Behring Sea to an extent exceeding 59 miles from the shores of Alaska:

That 59 miles is mentioned, you will understand, because the vessel was caught at about that distance.

That this territorial jurisdiction, in the enforcement of the laws protecting seal fisheries, was asserted by actual seizures during the seasons of 1886, 1887 and 1889, of a number of British vessels; that the Government persistently maintains that such jurisdiction belongs to it, based not only on the peculiar nature of the seal fisheries and the property of the Government in them, but also on the position
1054 that this jurisdiction was asserted by Russia for more than 90 years, and by that Government transferred to the United States, and that negotiations are pending on the subject.

And then he proceeds, on the lines my learned friend refers to, to point out that in the Statute as finally enacted, the words "all the waters of Behring Sea in Alaska embraced within the boundary lines mentioned and described in the treaty with Russia of 1867" were omitted, and the expression "all the dominion of the United States in the waters of Behring Sea" was substituted.

Then he proceeds:

If reference could be properly made to such matters (for the act, as finally approved, must speak for itself) still we do not concur in the view that it follows that Congress thereby expressly invited the judicial branch of the Government to determine what are "the limits of Alaska Territory and the waters thereof", and what is "the dominion of the United States in the waters of Behring Sea", and think, on the contrary, that there is much force in the position that, whatever the reason for the conservative course pursued by the Senate, the enactment of this section with full knowledge of the executive action already had and of the diplomatic situation, justified the President in the conclusion that it was his duty, under Section 3, to adhere to the construction already insisted upon as to the extent of the dominion of the United States, and to continue to act accordingly. If this be so, the application calls upon the Court, while negotiations are pending, to decide whether the Government is right or wrong, and to review the action of the political department upon the question, contrary to the settled law in that regard.

Therefore my friend's latter statement is quite correct. I quite admit it, but it is not correct to say, as stated in the printed Argument, that the Court intimated an opinion that the capture could have been justified in law as a defence of national interest. That is the main dividing line between us.

Now, Mr. President, I come back to the question, and I repeat the hypothesis on which it is to be regarded,—the *datum* for the argument. I have to assume, and the proposition that my learned friend advanced assumes, that there is no property in the seal, and no property in the seal herd. I have also a right to assume that the general right of fishing acknowledged by the Treaty of 1824 between Russia and the United States, and the same general right of fishing acknowledged by the Treaty of 1825 between Russia and Great Britain, did not except any living thing in the sea. I have further to assume that that was but a

recognition, in the case of the waters of Behring Sea and the other waters, involved in the controversy which led up to those Treaties, of the general right of all mankind to fish in the sea and to take therefrom outside territorial waters whatever they are able to capture. These are the hypotheses, these are the data, in view of which this proposition must be approached; and I say it without any affectation, with the greatest respect for my learned friend Mr. Phelps and for his ingenuity, that I find it difficult to understand and to appreciate what it is that I have to meet on this part of the case. The lessees may be treated, for the purpose of this discussion, as the owners of the islands and the owners of the industry. What is their position? What
1055 is their industry? They wait until the seals come to the islands, and, when the favourable opportunity offers, they select such as they desire to kill, and adopt the best means they can for killing them. They are in this exercising their right as owners of the territory. Nobody disputes their right. They may extend that right still further, assuming them to be the possessors of the island, as I am doing for simplicity's sake, and if they choose they can supplement their killing on the island by killing within the three miles of territorial waters, and by claiming to exclude, and rightfully claiming to exclude, all others from that area; and, if they choose further, they may go out on the high seas and compete with others who are sealing upon the high seas. These are their rights fully and exhaustively stated: their right to kill the seals upon the land,—an exclusive right; the right to kill within the territorial waters,—an exclusive right; their right, on terms of equality with all whose interest or convenience may prompt them to resort to the high seas, to pursue and kill the seal.

Where is the right that is invaded by that pelagic sealing? Where is the legal right invaded? Because, to constitute an invasion of a right, you must first prove the existence of the legal right. It is not enough to prove that their industry (if I must use that phrase) may be less profitable to them because other persons, in the exercise of the right of sealing on the high seas, may intercept seals that come to them,—that may be what lawyers call a *damnum*, but it is not an *injuria;* and I have no doubt the legal minds I am addressing understand the distinction between the two.

Let me assume that the island is divided by a boundary line, between two owners, one half of the island, given to A., the other half given to B. Would A. have an action against B.—could he complain that B. had perpetrated a legal injury upon him, if B. not merely killed the seals that came to his own division of the island, but exercised his right of sealing on the sea and killed seals there which might have gone, or some of which might have gone, to the land of A: if B. had in other words exercised his right to kill on the high sea? That would have been a case in which the profits or the volume of A's business might have been diminished, and he would, therefore, have suffered a loss, a *damnum;* but a *damnum* does not give a legal right of action. There must also be the *injuria*,—the invasion of the legal right; There must be *injuria cum damno;* the combination of the two.

The PRESIDENT.—Unless done maliciously.

Sir CHARLES RUSSELL.—You are good enough, Mr. President, to anticipate the very next topic,—perhaps not immediately the next, but a topic to which I am going in a moment to advert.

Let me illustrate the position of things a little further by putting an imaginative case or two. Suppose there was no industry on the island

Position of malice in the enquiry examined.

t all; it will not be denied that we could kill on the high eas; or, if it be denied, it will not be denied with very uch efficacy; our right would be undoubted. Again, suppose that from some cause or another (I care not what), the 056 United States should find it beneath its dignity, or not conducive to its profit, to carry on this industry on the islands,—say, that does not pay, for instance: they cease to carry on the industry. hould we still be without our right to seal on the high seas? Clearly ot. Can it be said that our rights, or their rights relatively to us, hift and change according to the eventuality of whether there is or not, according to their own interest for the time, an industry carried n there? It is impossible that legal rights can be of this shifting and arying character. No, Mr. President; their rights are strictly those hich I have enumerated; the right to kill on the islands exclusively; he right to kill within the territorial limits exclusively; the right to ompete on the high seas on terms of equality with all the rest of mankind: and that is the whole statement of their legal, positive rights.

But there is another right, I admit. They would have a right to omplain (and this meets the whole of the illustrations which all the ingenuity of my learned friends have supplied) if it could be truly sserted that any class or set of men had, for the malicious purpose of injuring the lessees of the Pribilof Islands and not in regard to their own profit and interest and in exercise of their own supposed rights, committed a series of acts injurious to the tenants of the Pribilof Islands. I agree that that would probably give a cause of action; and, therefore, they have the further right (what I might call the negative right) of being protected against malicious injury.

Now I have stated, I conceive exhaustively, as a lawyer would state hem, and as a lawyer I respectfully think ought to state them, what re the rights of owners of the Islands in relation to this so-called ndustry.

The point, Mr. President, to which you were good enough to refer is ell illustrated by reference to the case I mentioned yesterday, *Keeble . Hickeringill;* and the passage is at page 116 of the printed Argument the United States. In the Report of this case in the 11th Modern eports, at page 75, Lord Chief Justice Holt says:

> Suppose the defendant had shot in his own ground; if he had occasion to shoot it ould be one thing, but to shoot on purpose to damage the plaintiff is another thing nd a wrong.

That brings out clearly and neatly the distinction; that is to say, at when a man is exercising his right, a right which I assume that I ave established by reference to the general law and by reference to he Treaties,—to kill seals on the high sea, and he pursues that avocaion or industry for the purpose of making a profit to himself and aking it legitimately for himself in that way, not thinking of injuring nybody but merely of enriching himself in the exercise of what he onceives to be his right, his act cannot be regarded as malicious: and here is, from beginning to end of this case, no suggestion that the ction of the pelagic sealer could be properly regarded as malicious, or e attributed to any other motive than that of self-gain in the exercise of a supposed right.

1057 The PRESIDENT.—Would you consider, as having a certain maliciousness in itself, what has gone on during the last two years, where the *modus vivendi* has impeded the process of seal killing on the islands and left in the open sea, in the Pacific, at least, and on the North-west Coast, the pelagic sealing quite free. We have

witnessed, according to the statistics which were read to us, I might say an extraordinary increase of the pelagic sealing during these two years, during this sort of "close season,"—at all events, close season for the Americans:—is that quite free from maliciousness in your eyes?

Sir CHARLES RUSSELL.—Absolutely. Let me suggest this; or, rather, let me first make the ground perfectly clear. The first time that the suggestion of the word "malice" has occurred here comes from you, Mr. President. You will not find a trace or suggestion of it in the Case, or in the diplomatic correspondence.

The PRESIDENT.—But malice may exist without suggestion.

Sir CHARLES RUSSELL.—You are dealing with this case, I presume, Sir, like every other Tribunal, according to the case presented, supplemented by such additional light as your own erudition may bring to bear upon it. The case is not presented as a malicious injury, but as the case of an invasion of a legal right. That is what I meant to urge upon you; but I would like to consider it a little more closely for a moment.

In the pelagic sealing which occurred after the *modus vivendi* many persons took part belonging to various nationalities. You will bear in mind, of course, that the people who engaged in this were not Canadian sealers only, but were American citizens also. It is a little strong to suggest that the American sealers were pursuing this pelagic sealing not to benefit themselves, not to put profit into their own pocket by the pursuit of what they conceived to be a right, but were doing it maliciously to injure the property of the nation to which they belonged. I think the suggestion, with great deference, will not be found to be sustained by any facts.

The PRESIDENT.—I merely want to make the matter quite clear. I did not suggest anything myself, of course.

Sir CHARLES RUSSELL.—The point I wish to emphasize is this. My learned friends are acute lawyers, as of course you know, and men of eminence. They know how best to frame their case in the way that seems to them strongest. We have seen how they have departed in a large measure, as I conceive, from the original case put forward, and as I have endeavoured to demonstrate, in the diplomatic correspondence, and how, in this elaborate written argument, they have formulated in the best way they conceived it possible to formulate it.

They know as well as any of us that there is the greatest distinction in point of law as to the legal liability for acts done maliciously and for acts not done maliciously; and therefore, as they cite such cases as *Keeble* v. *Hickeringill*, if it had been intended to suggest that the pelagic sealers were doing this not to profit themselves, but to
1058 injure the tenants of the Pribilof Islands or the United States interest in the Pribilof Islands, we should have had, of course, some definite suggestion of that sort.

Lord HANNEN.—I follow your argument so far, but does that argument meet an illustration of Mr. Phelps? Suppose dynamite was used for the same purpose and resulted in the wholesale destruction of fish, that would not be malicious, because it was done for the purpose of immediate gain. What would you say to that case?

Sir CHARLES RUSSELL.—I have not forgotten that illustration, and as you mention it, my Lord, I will come to it at once. I am taking it a little out of order. The case my friend has put in that connection is this, that where the use of dynamite would cause a wholesale destruction of fish with a small and disproportionate gain to themselves it would be illegal: that is my learned friend's proposition. To begin

h, I should say that it might be very strong evidence, as one would in our English Courts, to go to the Jury, of malice; but it is not ry act which causes destruction, and even destruction which may disproportionate to the gain derived, which constitutes an action- e wrong. Let me illustrate that in a way that will be familiar to h Member of the Court. Take, for instance, the mode of fishing wn as trawling. I think you all realize what trawling is: that mode fishing—dragging a heavy beam with a net along the bottom—has effect of destroying enormous quantities of small fish and, still re, of disturbing spawning ground, and causing an enormous ount of mischief in the destruction of fish.

las any international law ever declared, or has any nation ever erted that that destruction outside its territorial limits,—because wling goes on many miles out at sea and in very deep waters—would e a cause of international complaint as a matter of right against trawlers of another nation? No, because on the high sea all are al; and although that particular method is a destructive method, case is met in the only way in which it can be met, by regulations, conventions, but not by the assertion of a legal right to prevent the wling, even although it cause that great mischief.

Lord HANNEN.—Are there conventions on that subject?

Sir CHARLES RUSSELL.—Oh yes, my Lord—conventions, as the esident will tell you, between France and Great Britain on that very bject. I will mention later conventions between Canada and the ited States with a view to preventing the use of dynamite by the tionals of either country on the high sea.

Then may I also put the question with reference to the use of dyna- te from another point of view? One might use dynamite for the rpose of trying some very important experiment, or testing some portant invention connected with war—torpedo experiments, or what t—these may be tried upon the high seas, outside territorial waters; d yet such experiments may be conducted in such a position as gards an adjoining nation that very considerable mischief may be done temporarily to the fishing interests of that particular 69 nation. But that would be a perfectly legitimate use of the high sea. The nation conducting the experiment would be acting for justifiable cause, and within its right; and if, acting within a right, causes damage to another person, it gives that other person no cause complaint, because no legal right of his has been invaded.

Senator MORGAN.—It seems to me we are getting into a difficulty re by failing to take notice of the well-established distinction between press and implied malice. The law implies malice from any wanton done against the life or property of another, or from any act that is essarily destructive of the life or property or business of another— en that is a requisite element in the right of action. The law implies rom the nature of the act.

Lord HANNEN.—But that implication may be met by showing it was ne with an excusable cause.

Senator MORGAN.—Always; but if a process by which a certain spe- s of property is destroyed, as by dynamite, is used in the neighbour- od of property which belongs to another person, that process would considered malicious in law and the answer that it was done in pur- it of a legitimate object would not be good. For instance, if the seal- s draw up a cordon of ships around the three mile limit, and take seals ere as they come to and as they go from the Pribilof group of Islands ring the breeding season, taking them indiscriminately—then it

would scarcely be held I think by any Court that that was an act from which malice would not be implied.

Sir CHARLES RUSSELL.—Surely Mr. Senator you are putting an impossible—an extravagant case; but I will tell you what the remedy would be; and here lies I think the confusion that has prevailed in the branch of the argument which deals with the rights of self-defence and self-preservation. In such a case as that the United States would say: whether we have a legal right or not, this is a matter so important to us that we will take our stand and make it, if need be, a matter of war. That is what they would say.

Senator MORGAN.—Or an Arbitration such as this.

Sir CHARLES RUSSELL.—No: this Arbitration has nothing to do with rights of war. This is to declare legal rights in time of peace.

But I must follow up this point, as the President has broached it for the first time, and I was not intending to do more than make a passing allusion to it. The suggestion of the learned President is that the sealing outside Behring Sea and under the *modus vivendi* of 1891, and of 1892, while they were in operation, might itself—of course he was not expressing any opinion—but he suggested whether that might not be regarded as malicious. Let me recall the facts. The United States has the power to control its own citizens everywhere. It had the power both before its acquisition of this territory and after its acquisition of this territory, to impose any restrictions it chose upon its own nationals wherever those nationals were. After 1867, the United States acquired an interest in these islands: the nature of that interest we are
1060 now discussing. Is it not a little strong to say, or even to suggest, that they could have regarded the pelagic sealing of their own nationals, carried on from 1867, for a period of so many years, as a malicious injury to them? We have the extraordinary fact that according to the law of the United States, as it is to-day, pelagic sealing outside Behring Sea is a perfectly lawful thing; and yet it is to be suggested that pelagic sealing outside Behring Sea was a malicious thing done to injure the United States. So regarded, the suggestion becomes grotesque.

I do not know whether the learned President realizes the point I am now putting: that absolutely according to the law of the United States as it is to-day pelagic sealing is a lawful pursuit outside Behring Sea.

The PRESIDENT.—I perfectly realize what you state, and what the American counsel have argued, but we must keep in remembrance that all these matters are extremely recent—pelagic sealing has not been found fault with until 1886. Very few years have passed, and in all countries the action of legislation is always slow.

Sir CHARLES RUSSELL.—With great deference, I am dealing with the thing as it is. Pelagic sealing has gone on as the oldest pursuit of seals from time immemorial. Since the time that seals were first hunted, they were hunted *pelagically*, and it is no answer to say that it was then conducted upon a scale and at a time when it did not affect, in a material degree, the interest of the United States. But I am coming a little closer to the action of the United States. The learned President refers to the years 1891 and 1892, but is he aware that the books before him show that in 1891, engaged in pelagic sealing, outside Behring Sea, were 48 *American vessels*, and in 1892 outside Behring Sea were engaged 46 *American vessels*—lawfully, according to the law of the United States, engaged in this pursuit of pelagic sealing, and engaged in it ever since 1880; because although it increased, as the learned President quite rightly said, in later years, and increased considerably in later years, it

still was not without a certain volume of importance even during earlier years. The suggestion is worth following. In the first volume of the Appendix to the United States Case, there is a table giving the nationality of the vessels engaged in pelagic sealing.

Sir JOHN THOMPSON.—I thought the decision you lately read, Sir Charles, was to the point that if the defendant had had no occasion to shoot or kill birds or animals on his own land, it would have been malice prepense?

Sir CHARLES RUSSELL.—Yes, but as the learned President has mentioned the subject I think it respectful to pursue it a little further.

Sir JOHN THOMPSON.—Before you finish I should like to ask you to satisfy me upon what branch of this enquiry we have given us in charge the question of malice prepense.

Sir CHARLES RUSSELL.—I do not know, because it is not alleged. I hear of it for the first time.

Lord HANNEN.—You take the point that it is not amongst the *allegata.*

1061 Sir CHARLES RUSSELL.—It is not amongst the *allegata.*

Sir JOHN THOMPSON.—I am not upon that, but upon what branch of the Treaty is this? on what question—Jurisdiction, property interest, or regulations?

Sir CHARLES RUSSELL.—I do not know. I cannot say.

Mr. Justice HARLAN.—I suppose it arose from the distinction you were making between the destruction of the industry maliciously or by simple pursuit, and what you regard as a right.

Sir CHARLES RUSSELL.—Yes. The way, probably, it would be said to have some relevance is this. I was stating what were the positive rights attached to an industry; and I was stating what negative rights an industry had: the negative right I indicated was, to be protected against a malicious injury. They do not complain of malicious injury.

The PRESIDENT.—Supposing an allegation of malice had been made—it is not the case—it would refer would it not to question 5?

Sir CHARLES RUSSELL.—I find it difficult to say that it would; but I assume that it would for the moment.

The PRESIDENT.—Until the regulations come to be considered.

Senator MORGAN.—It seems to me it refers to the third question of Article I. The third question of Article I concerns the rights of the citizens of both countries to take seals in the open sea.

Sir CHARLES RUSSELL.—No, Sir, with deference.

Senator MORGAN.—"The rights of the citizens and subjects of either country as regards the taking of fur-seals in or habitually resorting to the said waters."

Sir CHARLES RUSSELL.—That Article is "*The questions which have arisen,*" concerning, and so on. *Then the formulation of the questions to be answered is to be found in Article VI.*

Senator MORGAN.—*I do not so understand the Treaty. Those are the points in Article VI. Not questions, but subdivisions of questions.*

Sir CHARLES RUSSELL.—I was about to call attention to a Table which I have before me. First however I wish to note the fact that on page 108 of the first volume of the Appendix to the Case of the United States, it appears that as early as 1876 an American vessel called the "*San Diego*" was seized for sealing near Otter Island, which is close to the Pribilof Islands.

Mr. Justice HARLAN.—Is not that 1883?

Sir CHARLES RUSSELL.—No, Sir, 1876—she was an American vessel.

Mr. Justice HARLAN.—The "*San Diego*"?

would scarcely be held I think by any Court that that was an act from which malice would not be implied.

Sir CHARLES RUSSELL.—Surely Mr. Senator you are putting an impossible—an extravagant case; but I will tell you what the remedy would be; and here lies I think the confusion that has prevailed in the branch of the argument which deals with the rights of self-defence and self-preservation. In such a case as that the United States would say: whether we have a legal right or not, this is a matter so important to us that we will take our stand and make it, if need be, a matter of war. That is what they would say.

Senator MORGAN.—Or an Arbitration such as this.

Sir CHARLES RUSSELL.—No: this Arbitration has nothing to do with rights of war. This is to declare legal rights in time of peace.

But I must follow up this point, as the President has broached it for the first time, and I was not intending to do more than make a passing allusion to it. The suggestion of the learned President is that the sealing outside Behring Sea and under the *modus vivendi* of 1891, and of 1892, while they were in operation, might itself—of course he was not expressing any opinion—but he suggested whether that might not be regarded as malicious. Let me recall the facts. The United States has the power to control its own citizens everywhere. It had the power both before its acquisition of this territory and after its acquisition of this territory, to impose any restrictions it chose upon its own nationals wherever those nationals were. After 1867, the United States acquired an interest in these islands: the nature of that interest we are
1060 now discussing. Is it not a little strong to say, or even to suggest, that they could have regarded the pelagic sealing of their own nationals, carried on from 1867, for a period of so many years, as a malicious injury to them? We have the extraordinary fact that according to the law of the United States, as it is to-day, pelagic sealing outside Behring Sea is a perfectly lawful thing; and yet it is to be suggested that pelagic sealing outside Behring Sea was a malicious thing done to injure the United States. So regarded, the suggestion becomes grotesque.

I do not know whether the learned President realizes the point I am now putting: that absolutely according to the law of the United States as it is to-day pelagic sealing is a lawful pursuit outside Behring Sea.

The PRESIDENT.—I perfectly realize what you state, and what the American counsel have argued, but we must keep in remembrance that all these matters are extremely recent—pelagic sealing has not been found fault with until 1886. Very few years have passed, and in all countries the action of legislation is always slow.

Sir CHARLES RUSSELL.—With great deference, I am dealing with the thing as it is. Pelagic sealing has gone on as the oldest pursuit of seals from time immemorial. Since the time that seals were first hunted, they were hunted *pelagically*, and it is no answer to say that it was then conducted upon a scale and at a time when it did not affect, in a material degree, the interest of the United States. But I am coming a little closer to the action of the United States. The learned President refers to the years 1891 and 1892, but is he aware that the books before him show that in 1891, engaged in pelagic sealing, outside Behring Sea, were 48 *American vessels*, and in 1892 outside Behring Sea were engaged 46 *American vessels*—lawfully, according to the law of the United States, engaged in this pursuit of pelagic sealing, and engaged in it ever since 1880; because although it increased, as the learned President quite rightly said, in later years, and increased considerably in later years, it

still was not without a certain volume of importance even during earlier years. The suggestion is worth following. In the first volume of the Appendix to the United States Case, there is a table giving the nationality of the vessels engaged in pelagic sealing.

Sir JOHN THOMPSON.—I thought the decision you lately read, Sir Charles, was to the point that if the defendant had had no occasion to shoot or kill birds or animals on his own land, it would have been malice prepense?

Sir CHARLES RUSSELL.—Yes, but as the learned President has mentioned the subject I think it respectful to pursue it a little further.

Sir JOHN THOMPSON.—Before you finish I should like to ask you to satisfy me upon what branch of this enquiry we have given us in charge the question of malice prepense.

Sir CHARLES RUSSELL.—I do not know, because it is not alleged. I hear of it for the first time.

Lord HANNEN.—You take the point that it is not amongst the *allegata.*

1061 Sir CHARLES RUSSELL.—It is not amongst the *allegata.*

Sir JOHN THOMPSON.—I am not upon that, but upon what branch of the Treaty is this? on what question—Jurisdiction, property interest, or regulations?

Sir CHARLES RUSSELL.—I do not know. I cannot say.

Mr. Justice HARLAN.—I suppose it arose from the distinction you were making between the destruction of the industry maliciously or by simple pursuit, and what you regard as a right.

Sir CHARLES RUSSELL.—Yes. The way, probably, it would be said to have some relevance is this. I was stating what were the positive rights attached to an industry; and I was stating what negative rights an industry had: the negative right I indicated was, to be protected against a malicious injury. They do not complain of malicious injury.

The PRESIDENT.—Supposing an allegation of malice had been made—it is not the case—it would refer would it not to question 5?

Sir CHARLES RUSSELL.—I find it difficult to say that it would; but I assume that it would for the moment.

The PRESIDENT.—Until the regulations come to be considered.

Senator MORGAN.—It seems to me it refers to the third question of Article I. The third question of Article I concerns the rights of the citizens of both countries to take seals in the open sea.

Sir CHARLES RUSSELL.—No, Sir, with deference.

Senator MORGAN.—"The rights of the citizens and subjects of either country as regards the taking of fur-seals in or habitually resorting to the said waters."

Sir CHARLES RUSSELL.—That Article is "*The questions which have arisen,*" concerning, and so on. *Then the formulation of the questions to be answered is to be found in Article VI.*

Senator MORGAN.—*I do not so understand the Treaty. Those are the points in Article VI. Not questions, but subdivisions of questions.*

Sir CHARLES RUSSELL.—I was about to call attention to a Table which I have before me. First however I wish to note the fact that on page 108 of the first volume of the Appendix to the Case of the United States, it appears that as early as 1876 an American vessel called the "*San Diego*" was seized for sealing near Otter Island, which is close to the Pribilof Islands.

Mr. Justice HARLAN.—Is not that 1883?

Sir CHARLES RUSSELL.—No, Sir, 1876—she was an American vessel.

Mr. Justice HARLAN.—The "*San Diego*"?

Sir CHARLES RUSSELL.—The "*San Diego*". She was seized again later. That probably will explain it. There are several vessels of that name, but this one was seized in 1876.

Now the Table to which I was calling attention, and which faces page 590 of the same volume, shows that in 1880 there were 7 British and 9 American vessels.

In the year 1881 there were 7 British and 2 American.

1062 In 1882 there were 12 British and 3 American.

In 1883 there were 10 British and 3 American.

In 1884 there were 5 British and 6 American.

In 1885 there were 3 British and 11 American.

I need not follow it to the end. The columns are long, and will take some time to add up: but when you get on a little further they seem to be about equal numbers all through; and towards the end I think there are more British. I therefore treat this matter in this way.

Mr. PHELPS.—The British Commissioners' Report increased the number of British vessels.

Sir CHARLES RUSSELL.—My friend Mr. Phelps says that the figures given by the British Commissioners increase the number of British vessels in later years. That may be so. It does not touch my argument.

The matter therefore stands thus: Pelagic sealing outside Behring Sea lawful by the law of the United States; no allegation that the pursuit of such sealing, although contrary to the United States law, which binds only its own nationals, inside Behring Sea, was contrary to the law outside Behring Sea, or was maliciously pursued either inside or outside. And lastly the point which Sir John Thompson has suggested, and which I have already endeavoured to make—that no suggestion of malice can be maintained when the thing is done in pursuance of what is claimed to be a right, and for the profit of the individual who pursues that right.

Further, if it is necessary to add anything else—if malice can enter into this question at all—it must be malice in the *individual:* you cannot attribute malice to a mass of individuals. Therefore I think I have given sufficient reasons why my friends have not made this point. It would be a bad one if they had made it. They have made some points which I cannot think are good; they have not made this point, which I submit would be utterly bad.

But now I have to call the attention of the Tribunal to what would have been the far-reaching consequences of this contention: I have stated, simply and I think correctly, the contention of my learned friend as follows—that when a nation has an industry on its shores which depends on the resort to its shores of certain animals which that nation has no exclusive right to take, and in which it has no property, it nevertheless may claim that the killing on the high sea is an invasion of its right, although such killing is itself done in the exercise of a right, if the result of that killing is to interfere with the animals reaching the land, and so to lessen the possible profit which may be made on the land.

The rights in an "industry" examined.

We know what rights are attached to an industry. There is the right to carry on the business. If there is a good-will; there is a right to the good-will. If there are trade-marks in connection with the business, those trademarks may be protected. It may be defended against malicious attack. But this exhausts the statement of the rights, both

1063 positive and negative. There are no other rights in connection with it known to the law: the catalogue is exhaustive. Always bearing in mind that we are arguing upon the assumption of no property

nd no exclusive right, let us see what would be the consequences of his new principle which is asserted? Where will it land us?

Just let me put some of the cases. Take that large and increasing volume of industries carried on upon the west coast of America, and along the coast of British Columbia, and stretching further north along the Alaskan coast, known as the salmon canning industries. You, probably, Mr. President, hardly appreciate what an enormous industry that is. Unless you have visited the neighbourhood of the Willamette River, as I have had the opportunity of doing, and of Portland, in Oregon, you can form no idea of the extent and importance of that great industry as a means of food supply to mankind. Supposing by some modern system and improved method of catching salmon, neighbouring nations should be attracted to the fishing, and catching large numbers outside the territorial waters should intercept the salmon on their way up the rivers where they would be brought within the reach of this industry: is it to be said because the canning industry would be thereby injured, that there would be a *legal right* to prevent the fishers from operating ouside the territorial waters on the ground that they prevented the salmon coming up the river to the place where they could be more conveniently caught? Once you have realized that exclusive right to take is out of the question, the parallel is complete.

Take another illustration: the case of the fishery on the coast of Newfoundland—a matter largely debated, for many reasons—an enormous industry carried on on the coast by reason of the possession of that territory of Newfoundland, not merely because the sailors are in a convenient position to go to sea and catch the fish, but because their ownership of that territory enables them to do an enormous trade, to carry on an enormous industry, in curing fish upon the land. Supposing that that industry is found to be greatly affected, because some enterprising American sailors and fishermen go outside the three-mile limit and catch enormous quantities which would otherwise have come within the three-mile limit, and so nearer to and within easier access of the Newfoundland fishermen: suppose that the interference were so great that their industry should droop and their commerce should be blighted: would that give them any legal right? None whatever.

Again, take the case of the Guano Islands in the south, where the deposits of countless myriads of birds, over many years, have caused there accretions of enormous value in the shape of guano. Supposing some change of fashion took place, which offered a fitting reward to the sportsman or to the hunter to kill these birds, in their tens and hundreds of thousands for the sake of their plumage, and that thereby this great and profitable guano industry on the islands were impaired, nay, brought to an end. Could the owners of the islands complain
064 that because they were carrying on an industry on the islands, a valuable industry, an important industry, and because that industry was attacked by these men in shooting these tens of thousands of birds outside the islands, that *therefore* that shooting was wrong?

Or take again the illustration, which is an apt one, as it seems to me, where the collection of the eggs of the wild birds of the air is an important industry, as it is upon many islands, as it is in connection with some of these very islands in Behring Sea. I have got here before me a book which I should like to hand to the Tribunal to examine. It is a Report of Mr. Elliott in 1874, the one that is referred to by my learned friends in some parts of their case and argument, in which he refers—

Mr. FOSTER.—We discuss your reference to it.

Sir CHARLES RUSSELL.—Really I do not understand you.

Mr. PHELPS.—*We* do not refer to it. We do not understand it is in the Case. We have not seen it.

Sir CHARLES RUSSELL.—Not seen it? Not seen the report of 1874?

Mr. Justice HARLAN.—Sir Charles is talking of the Report of 1874.

Mr. PHELPS.—Elliott's Report of 1874. It is not in *our* Case.

Sir CHARLES RUSSELL.—I am at a loss to know what the interruption means.

Mr. PHELPS.—It means that we were suggesting that the document from which my friend is about to read is not in the Case. It is not in evidence that I know of, and therefore I have not examined it.

Mr. Justice HARLAN.—It is cited either in the British Case or Counter Case.

Mr. FOSTER.—That is what I said. It is cited by *them*—not by *us*.

Sir CHARLES RUSSELL.—It is cited again and again. Why I should be interrupted I do not know. I do not complain of the interruption, but I do not understand its cause. I think I am well founded also in saying it is referred to by Mr. Blaine in his earlier correspondence.

Mr. CARTER.—We have not referred to it ourselves in our Case. We have carefully avoided everything of Mr. Elliott's.

Sir CHARLES RUSSELL.—Well, that is rather an awkward admission, which my learned friend perhaps had been wiser not to make.

Mr. CARTER.—We are willing to admit it.

Sir CHARLES RUSSELL.—Because this is the gentleman whom they constituted a special Commissioner by a special Act of Congress in the year 1890. He was the creation of Congress to go out to make a report on the Pribilof Islands.

The PRESIDENT.—Is there any reason why the scientific authority of Mr. Elliott should be considered as not valuable?

Mr. CARTER.—We totally distrust him, and have carefully avoided him. He is a great favourite on the other side.

Sir CHARLES RUSSELL.—As a learned Judge once said, it sometimes happens that a witness who is called for the plaintiff turns out
1065 to be a very valuable witness for the defendant; therefore the plaintiff naturally distrusts him.

Mr. FOSTER.—*We* have not called him as a witness.

The PRESIDENT.—Do you say he was recalled by the Government? Is that your remark?

Mr. FOSTER.—I say we have not called him as a witness.

Sir CHARLES RUSSELL.—No, you have not; and that induces me to say what I thought was beyond dispute. You constituted him a special commissioner by Act of Congress in 1890, and you clothed him with a special authority, as the best person you could select for the purpose of enquiring into this very question, *after it had arisen* in controversy between Great Britain and America; and because his results do not suit the argument or the purposes of my learned friends, then he is rejected, and his evidence discarded.

Mr. CARTER.—The reason of it is another thing.

The PRESIDENT.—Is it a reason which you can state?

Mr. CARTER.—Our interruption was founded solely upon this: Sir Charles sought to impute him to us. We reject him. That is all.

The PRESIDENT.—What I took the liberty of asking you was whether you distrust him as a bad observer, or for another reason, a reason which might make his observations suspicious.

Mr. CARTER.—Oh, we distrust him because we suppose that he is an untrustworthy observer—a man who is given to theories, and not to an accurate dealing with facts. It is on this ground that we distrust

him. He is not a man from whom we conceive the truth can be well and suitably gathered.

The PRESIDENT.—I believe there were some contradictions, were there not, in his observations at different periods?

Mr. CARTER.—We think a great many. Mr. Phelps will probably have something to say about him.

The PRESIDENT.—Very well.

Sir CHARLES RUSSELL.—I would dismiss this subject in a word. I only intended to make a passing reference to it. If there is anything to be said about this gentleman, let it be said by members of the Tribunal, or let it be said by my learned friends, so that we may know what it is; because I find myself in a very strange position in regard to him. I find this gentleman, not once, but twice, instructed to report officially for the United States Government. The document which I was about to refer to is an *official document* printed by the Government Department at Washington in 1874, and it appears in the Tenth Census Report of the United States. I find that it was reprinted, in 1881. I find that in 1890 the author is appointed to report by an Act of Congress, which I have got here if there is any doubt about it.

Mr. CARTER.—None of those things are questioned. It is not the first time the United States has had an objectionable man in its employment.

1066 Sir CHARLES RUSSELL.—Very well. He is objectionable because his evidence does not suit your purpose.

Mr. CARTER.—We will discuss that hereafter.

Sir CHARLES RUSSELL.—Now finally, we have got Mr. Charles J. Goff, the Treasury Agent, in charge of the seal islands, writing on the 31st of July, 1890, "There is but one authority upon seal life, especially the seals of the Pribilof Islands, and this is the work of Prof. H. W. Elliott, who surveyed these rookeries in 1872 and 1874, and his work was verified by Lieutenant Maynard, and I am satisfied was as near correct when made as was possible for a man to make; but to-day there is a marked contrast between the conditions of now and then." That was as late as July 1890. All I was going to say—it was really very innocent matter—

Mr. CARTER.—Except that you imputed him to us. That is all we object to.

The PRESIDENT.—I think it is clear that you do not trust him. Sir Charles trusts him. Well, we have to decide.

Sir CHARLES RUSSELL.—I merely asked you, Sir, to take a note of the page. I was not even going to trouble to read it. It is on page 127 of the Report, which is in my hands, in which he refers to the industry of collecting the eggs of these wild birds as being an important one, upon these very islands: I was merely referring to it as an illustration of the theme I am upon, the rights which are attached to an industry.

Now precisely the same argument which has been advanced in respect of this industry of seal-skinning would apply to this industry of collecting eggs.

Or again, take the case of a game preserver, and there are such in England, who does not preserve game merely for the sake of shooting the game, but who makes a *trade* of preserving game. They shoot the birds and thereby they get sport out of them; but they send their game regularly to market, making the best profit they can out of their business. I have already dwelt upon how much greater care and expense and cultivation, or, to use an expression dear to my learned friends, how much more "cherishing" the action of the game preserver in the matter

of pheasants is than it is possible for the action of the United States or their lessees to be; how the game preserver takes the eggs away from the nest to induce the bird to lay more than it otherwise would; how he places them under an ordinary fowl, and in that way rears them; how he feeds them and keeps them until they grow up, and he kills them; and yet when the birds go off his land upon the land of another, has it ever been heard, could it even be suggested, that this industry of sending his pheasants to market was injured in point of law because his unneighbourly neighbours in the open common adjoining waited until his birds escaped from his land, or were on the way back to it, and shot them there, thereby lessening his profits? The cases are absolutely analogous, but the case of the pheasants is much stronger.

Take again the case of a rabbit warren. A great many rabbits
1067 are imported from this country into England. They are cultivated as an article of commerce. They are also cultivated in England as an article of commerce. There are such things as rabbit farms where everything is given up to the rabbits, and they are sent to the market as regularly as you send barn-door fowls to market, or as you send eggs to market, or butter to market, or any other article of farm produce. Is it to be said that when these rabbits leave the land of the man where they are in the habit of burrowing, and go on the adjoining open common or into another man's land, and are shot, and thereby his chances of shooting them in his own warren are diminished, and thereby the volume of his business are diminished,—is it to be said that that gives him a right of action? No.

These are apposite illustrations which, always bearing in mind that the absence of property in the animals is the hypothesis on which the argument of property in the industry is based, show how fallacious that argument is.

The PRESIDENT.—Would you say that in the case of the Earl of Abergavenny, which you mentioned yesterday, if the deer had been shot out of his park, it would have been lawful?

Sir CHARLES RUSSELL.—No; because the jury found that the deer were tame. That is the difference. If there be any doubt about that, I will refer to it.

The PRESIDENT.—Oh no.

Sir CHARLES RUSSELL.—The jury found that the deer were tame; and of course I took it for granted that that point was present to the mind of the Tribunal. I am arguing this question upon the assumption that the seals are *feræ naturæ;* that is the assumption upon which my learned friend Mr. Phelps rests.

The PRESIDENT.—Would you consider the rabbits in the rabbit farms you spoke of as wild rabbits, as *feræ naturæ?*

Sir CHARLES RUSSELL.—They are so considered. I have never known any allegation of property in rabbits except in the case of tame rabbits, raised in hutches.

The PRESIDENT.—In France, you know, we cultivate tame rabbits.

Sir CHARLES RUSSELL.—In hutches you mean?

The PRESIDENT.—Yes in hutches. That is another thing?

Sir CHARLES RUSSELL.—That is a different thing altogether: I was not of course dealing with that case.

But on this point I hope I am followed by the Tribunal: I read the argument so that there should be no mistake about it. The proposition which my learned friend advanced assumes that the animals are *feræ naturæ.* Let me read it again, in order to make my ground clear.

The PRESIDENT.—Perhaps it is best to read it again.

Sir CHARLES RUSSELL.—It is on page 136:

The case of the United States has thus far proceeded upon the ground of a national property in the seal herd itself. Let it now be assumed, for the purposes of the argument, that no such right of property is to be admitted, and that the seals are
1068 to be regarded outside of territorial waters as *feræ naturæ*, in the full sense of that term.

I have been arguing, of course, upon the assumption of this proposition.

The PRESIDENT.—That is an assumption. That is not the general statement of the United States.

Sir CHARLES RUSSELL.—No, Sir.

The PRESIDENT.—It is an assumption merely for the sake of argument.

Sir CHARLES RUSSELL.—May I point out that I have been endeavouring, I thought, with the closest attention to the order of the points, to follow out this assumption. I have argued, first, the question whether there was a right of property, and in discussing this question, I endeavored to establish—I hoped I had established—that seals were *feræ naturæ*. I had passed away from that, and I had therefore assumed as the datum of this part of the discussion, as Mr. Phelps logically assumes, that they are *feræ naturæ*. His position is that, assuming them to be *feræ naturæ*, assuming no property in the seals or in the herd, yet that there is a property in the industry; that is the point I am now arguing.

The PRESIDENT.—There is no misconception about that.

Sir CHARLES RUSSELL.—No, Sir. Now, Sir, I have said all I have to say upon those general illustrations of the fallacy of this proposition.

The Tribunal here adjourned for a short time.

Sir CHARLES RUSSELL.—Mr. President, recurring to the proposition which I said at the commencement of my argument on this point must be established by my learned friends, I have now to submit that that proposition has not been and cannot be established. That proposition is that what must be shown is, that pelagic sealing is an invasion of a legal right attaching to the industry. I have dwelt at some length upon the matter, because of the respect that I unfeignedly feel for anything my learned friend Mr. Phelps feels justified in gravely advancing; but I have finally to say, first of all, that I find no authority either in municipal law or in international precedent to warrant the claim that is here made; secondly, that I have pointed out by illustrations that I have given, that if any such idea were to be accepted, novel as I submit it is, it certainly would apply to many other cases; and, when it is remembered that there is no property right in the thing or no exclusive right to take the thing, it would have a far-reaching importance.

There are two other subjects that were referred to incidentally in some observations which fell from you, Sir, as to certain rights, which might be likened to industrial rights, which had not a tangible existence, but which might be considered in the nature of property or property right, and the special illustration that you gave was in relation to copyright. Now I think that that was perhaps a reference not without its use, because it does present an
1069 illustration of a case in which there exist in the popular, ordinary acceptation of the phrase, natural rights of property which may take the form of a useful invention for the benefit of the world, or of a creation of the brain, either in the shape of works of imagination, the result of long labour and research, or works of history or science,

Copy and patent right.

or may take the shape of inventions to lessen labour and advance in that way processes useful to mankind—and would suggest that, in the case of the individuals, they were eminently deserving of protection and recognition; and, taking the productions of a nation in the aggregate, might well be said, without any extravagance of language, to constitute a national property or a national interest, speaking in popular language. Yet what is the fact in relation to both those subjects of copyright or patent right? I said a day or two ago that some English judges had declared that our earliest Statutes upon the subject of copyright were but an affirmance of a principle which was embodied in the Common Law. That has not been generally accepted. The earliest of our Statutes dates back to the time of Queen Anne. But though those opinions have been entertained by some Judges as to the existence of a common law right of protection to copyright, certainly they were not generally held, and certainly they were not views that were ever held to have any operation in the sense of establishing property outside the municipal law of England. I think the law of France is the same. I do not know any country which has protection except by comparatively recent legislation either for copyright or for invention. I do not think there is any trace of it—and I speak subject to the correction of the eminent Jurists I am addressing—in the earlier systems of law, especially the Roman law.

The PRESIDENT.—The first trace in France was in the form of a royal license for printing.

Sir CHARLES RUSSELL.—Quite so. Now I will state what the condition of things is internationally upon both these subjects. A good many of the civilized Powers have by international arrangement—I use international arrangement as distinguished from international law—sought to bring their mutual relations on the subject into consonance with municipal law.

Now, first as to copyright. One of the earlist International Conventions to which Great Britain was a party dealing with copyright was as recent as the year 1886; and up to that time it had been a matter of great complaint, as regards many foreign countries, on the part of English authors that their books were re-published under circumstances which gave them no reward whatever for their labour. And great complaints were made, especially of one great English-speaking community,—I mean, of America, though it also had its complaints, and well-founded complaints, which I shall presently refer to—but one great complaint was that in America English books were reproduced, and the profit of their reproduction went into the pocket not of
1070 the original author, but into entirely different channels; and to the general Convention I am about to refer to, America was no party. The part the United States of America played in the matter I will mention later; but, in 1886, Great Britain, Germany, France, Italy, Spain, Portugal, Belgium, Switzerland, Hayti and Tunis were parties to the International Copyright Convention of that year; and, under that Convention, authors of any of the countries, parties thereto or representatives of those authors, enjoy in the other countries for their works, whether published in one of those countries or not, the rights which the respective laws of those countries, either then or thereafter, give to the nationals of the particular country.

The enjoyment of these rights is made subject by the Convention to compliance with the conditions and formalities prescribed by the law of the country of origin of the work, and does not extend in other countries beyond the terms of protection granted in the country of origin.

As I have said, the United States was not a party to this Convention; but quite recently, I think in 1891, the United States passed a law granting security of copyright in the United States to the authors of any country which gives copyright to the productions of the citizens of the United States on the same terms as it gives protection to its own nationals in respect of any work printed and published first or, at least, simultaneously, in the United States; and, upon an official intimation from the Government of Great Britain that Great Britain in fact gives copyright protection to United States citizens on the same terms as she does by her law to British subjects, the President, under the authority of the law of the United States, may issue a Proclamation extending the benefits of the Act to British subjects.

Senator MORGAN.—Will you permit me to say that that Act of Congress was based upon the fact that the Constitution of the United States creates property in intellectual productions and also in inventions. It *creates* property.

Sir CHARLES RUSSELL.—That is my point. My point is, that while it creates or recognizes that for its own citizens and nationals, it did not recognise that property when it was the creation of British law.

Senator MORGAN.—It might have been so in practice; nevertheless, the Government of the United States assumed the right in virtue of its sovereignty to create property in intellectual productions and also in inventions, just as if they were material substances.

Sir CHARLES RUSSELL.—I assure you, Sir, I am not concerned to dispute that. I began by saying that the Copyright Act of Queen Anne was, by some of our Judges, supposed to be an assertion of a common law principle, which would be a recognition of property. The point I am upon, the learned Senator will see, is that, while municipally regarded there was property, there was no international recognition of that property.

Senator MORGAN.—That depends on international considerations; but the fact of property in intellectual efforts and productions,
1071 and property in inventions, was established by the Constitution of the United States.

Sir CHARLES RUSSELL.—I do not doubt it. I have said the fact was so as regards Great Britain. That is not the point I am upon. The point I am upon is that it was not internationally so regarded; namely, that the author producing an important work in England, the result of the labour of years or of a lifetime, had that work reproduced, pirated, in the United States and other countries. Do not let the learned Senator suppose I go into it for the purpose of recrimination, or anything of that kind, for I certainly do not. I only seek to show that internationally the property was not regarded, and that this Convention does not make international law; it is a step towards international law, but it does not make it. It is simply an agreement binding upon the Powers who are parties to it, and carrying with it an obligation upon the part of those Powers to take the necessary steps to give effect to it.

Now as regards inventions the United States, on the other hand, had very serious ground of complaint. The United States has added greatly to the wealth of the world in that field of invention especially which tends to the simplification of processes of labour, to which invention the spur had been given largely owing no doubt to the absence of a dense population to supply the full demands for manual labour. The state of the English law in that regard is this: Prior to 1883 it had been for many years the law in England that the person who introduced into the United Kingdom for the first time a new inven-

tion, whether it was his own invention or not, was considered the first and true inventor. I think I am right in saying that the same was the law in the United States of America, as regards inventions of other countries. The result was that many inventions created in America, when they became known there, were communicated by telegram or by post to Great Britain, and in Great Britain they were registered and patented: provisional specifications were filed, and so forth, and the person who so specified it, and patented it, although he might not have been the producer of the idea, and often was not, was, according to English law, the "first and true inventor".

This difficulty formed the subject of frequent discussions, and ultimately a convention was signed in Paris on the 20th March 1883, to which, in the first instance, Belgium, Brazil, Spain, France, Guatemala, Italy, and Portugal, amongst others, were parties: by which it was agreed in Article 4 that any person who had duly applied for a patent, design, or trade mark, in one of the contracting States should for a period of six months, and in some cases for a longer period, have the priority to the right of application for the patent or trade-mark in any of the other countries parties to the convention. The actual terms of the original convention were subsequently modified but not in any material respect upon this point. The United States subsequently joined in the convention, and thereby, in common with the other
1072 contracting countries, established a rule for the protection of designs, trade marks, and letters patent, which were called industrial property. Prior to this convention, and apart from the countries that are parties to it, no right of property in letters patent was recognized as between nations at all; and the law at this moment stands in this way, that though the concurrence of the most conspicuous Powers of the world goes a long way towards a general international copyright law and a general law in relation to patents, still, the law which affects internationally these two important subjects of copyright and of invention, rests solely upon the agreement embodied in the convention, and is binding solely on the parties to it.

Senator MORGAN.—That would become international law if we wait long enough and nobody objects.

Sir CHARLES RUSSELL.—In process of time I sincerely hope it will.

Now Mr. President, the next branch of the argument that my learned friend Mr. Phelps proceeds to is the consideration of the question, assuming that he has established an industry which he says is injuriously affected by something done, what by international law are the rights which a Power in time of peace may exercise for the protection of that right, or of that industry.

Examination of the argument as to the right of protection.

Now, of course, Mr. President, it is obvious that if I have succeeded in establishing that there is no right to protect, it becomes quite unnecessary to consider what are the rights of protection. I certainly should be quite content to leave the argument at this stage resting upon the ground that no right has been shown to exist, and therefore, where there is no right to protect, it becomes immaterial to consider what may or may not be done under international law, with a view to protection; but I do not wish to pass by in a contemptuous way any argument my learned friend has advanced; and I think it may throw some light on the general consideration of this question and upon the fallacies which, I conceive, creep into this part of the case, if I call attention to the cases which my learned friend has cited in support of this supposed right of protection in time of peace, and the acts which may by international law be done in defence of that right.

ıt first, and in order that the Tribunal may, when I am calling ıtion to these cases, appreciate the distinction which I make in ·ence to them, and the criticism which I shall take the liberty of ·essing in reference to them, I should like to be permitted to point in general language what I submit are the fallacies of the argu- ts based upon them. The fundamental fallacy in this connection und in the proposition advanced in the Argument of the United es that a State has in time of peace a right under international law, in its full rights of self defence and self-preservation, to do on the ı seas whatever it may conceive to be necessary to protect its prop- or its interests. That I conceive to be an unsound proposition. It makes the rights in time of peace the same as the rights in time of war. It confuses, I conceive, a variety of actions upon the part of States, and treats them as if they were all of the e character, to be explained and to be defended upon the same ınds, although, in fact, as I have to submit, they are different in ·acter and are defensible or are explicable by very various reasons. will be found that in these illustrations my learned friend, as I nit, has confounded acts done in a state of belligerency with acts ı in time of peace, and confounded acts which a nation *will* do in nce of what it conceives to be its interest with what it *may* legally ınder the sanction of international law. Now, still speaking gen- ly, I would ask to be allowed, without referring for the moment to books, which I shall do hereafter, to state generally the view which lesire to present upon this subject. I think, it will help to clear the ınd, and to make the subject more intelligible, if we consider the ı in which the rights of self-protection and defence, or self-preserva- as they are called, are recognized by international law, and the ınds on which that recognition is based.

ow, by far the greatest number of instances apply to the state of igerency, yet even here there are very strict rules. It will be recol- ·d that belligerent rights rest on the genuine emergency of danger, ·h is the true basis of all exceptional acts of self-defence, or of self- ·ervation, and upon the consent which in consideration of that dan- is given by neutral States. But even in the state of belligerency, as to belligerent rights, there are very clear limitations. Take the of contraband of war. The law of contraband of war does not nd to every commodity which a belligerent Power may choose to are contraband: and, therefore, if something which international does not recognize as contraband of war is seized by a belligerent, brought into a Prize Court for condemnation, although the belleig- t might have been morally justified, according to its view of the ·gency at the moment, in seizing that particular thing, a Prize ·t could not condemn it, according to international law, unless it led the conditions which are recognized by international law as g essential to contraband.

gain, take the case of blockade. There was an attempt in years ı by to establish what was known as paper blockade, but that is not gnized by international law. A blockade, according to existing ·national law, in order to carry with it the subsequent sanctions for npts to break it, must be an effective blockade. And if a ship is ·d by a belligerent Power, the International Prize Court would have onsider whether or not the condition of blockade existed which ıfied the seizure of a particular vessel as attempting to run that kade. Again, the belligerent Power might have thought itself jus- d in doing it on moral grounds; but, still, invoking international

law, it could not get a condemnation in a Prize Court unless it was shown that the offence had been committed contrary to the canons of international law.

1074 The nation might consider itself justified in seizing the ship going to run the blockade, though the blockade was not effective,—though the international conditions were not complied with; but it does so at its own risk. It does so at the risk of having to defend itself; and it does so with the consequence that, if it invokes the aid of an international Tribunal to condemn that ship, it cannot invoke it successfully. The nation seizes because it is thought the occasion justified it; because it is important that it should be done; but it is not a thing which, by international law, they are justified in doing.

Now, there is a good illustration of the distinction between what a nation *will* do and what a nation *may legally* do, in the well-known case of the "Trent", which occurred at the time when the United States was engaged in the great struggle of its Civil War. I would like to remind the Tribunal of what the circumstances of that case were. Certain gentlemen, among others a Mr. Mason and a Mr. Slidell, were on board the "Trent". These gentlemen were on board a neutral ship, an English ship, carrying the mails, not however that that gave any particular importance to it. They were bound on a mission to Europe, I think to England and France, to seek the aid of those Powers in their attempted revolt against the Federal Government of the United States. The "Trent" was seized, and possession of these gentlemen taken by the authority of the United States; and I have before me the Parliamentary Papers, which set out the whole of the correspondence in relation to this matter. The whole of it I do not intend, as you will conjecture, to trouble the Tribunal with; but what I do wish to call attention to is the position taken by the United States Minister Mr. Seward. He argues at very great length that these gentlemen might be treated as contraband of war; they were not soldiers, they were not carrying arms, but that nevertheless they might be treated as contraband of war. But that subject being treated by him at very great length in a despatch of the 26th of December, 1861, which extends to a great many pages, he finally, upon the remonstrances of Lord John Russell (who was then Foreign Secretary of Great Britain), feeling that he could not defend his position upon any international legal principle, agrees to release the men; and he adds that, as to this release, he does it the more willingly because he says all danger which might arise from their not being further detained had practically passed away.

To make this clear, I must go back a little. On the 9th of November, 1861, the announcement of the seizure is made; and Lord John Russell writes to the British representative at Washington on the 30th of November, 1861, announcing that intelligence of a very grave nature had reached Her Majesty's Government; and he proceeds to mention the facts, and he concludes by making a demand for the release of the men: he says:

It thus appears that certain individuals have been forcibly taken from on board a British vessel, the ship of a neutral Power, while such vessel was pursuing a
1075 lawful and innocent voyage, an act of violence which was an affront to the British flag and a violation of international law.

Her Majesty's Government, bearing in mind the friendly relations which have long subsisted between Great Britain and the United States, are willing to believe that the United States naval officer who committed this aggression was not acting in compliance with any authority from his Government, or that if he conceived himself to be so authorized, he greatly misunderstood the instructions which he had received.

For the Government of the United States must be fully aware that the British Government could not allow such an affront to the national honour to pass without

eparation, and Her Majesty's Government are unwilling to believe that it could e deliberate intention of the Government of the United States unnecessarily to into discussion between the two Governments a question of so grave a character, vith regard to which the whole British nation would be sure to entertain such imity of feeling.

r Majesty's Government, therefore, trust that when this matter shall have been ght under the consideration of the Government of the United States, that Gov- ent will, of its own accord, offer to the British Government such redress as alone d satisfy the British nation, namely, the liberation of the four gentlemen, and delivery to your Lordship, in order that they may again be placed under British ction, and a suitable apology for the aggression which has been committed.

ıen a communication of the facts was at the same time made to the ıch representative by some of the persons taken on board this ves- ;wo, I think, being French subjects; and Mr. Thouvenel writing to Mercier a communication which is afterwards communicated to Lord sell, takes the same ground of its being an offence against interna- al law. I need not trouble to read that.

ıen follows, also, a communication from the Austrian Minister in same sense as that from the French Minister. Also one from the nan Minister, Count Bernstoff, to Baron Gerolt in the same sense. ıen comes the long communication from Mr. Seward to which I have ady referred, but with which I do not think I need trouble you at th. He argues the question out; tries to suggest that these men ht be regarded as contraband of war; points out the difficulties of so rding them, and makes the best answer he can. That claim to treat n as contraband of war he afterwards withdraws; and, finally, when rites, announcing the release of the men, he says that if the safety ıe Union required the detention of the captured persons, it would be right and duty of the Government to detain them. "*The right and* ", you will observe is the language used. "Right" is one of those ds very often ambiguously employed. This correspondence demon- tes there was no right to seize or detain them by international law; when Mr. Seward used the word "right" in that connection, he nt what I have already adverted to—that it was something which *ld be done, right or wrong*, whether internationally defensible or not, e emergency of the situation and the interests of the United States ired that it should be done.

Now Lord Russell replies to that despatch on the 23rd January 1863 (I am reading from page 37 of this correspondence) in these words.

. Seward asserts that "if the safety of this Union required the detention of the ired persons it would be the right and duty of this Government to detain them." roceeds to say that the waning proportions of the insurrection, and the compar- unimportance of the captured persons themselves, forbid him from resorting to defence. Mr. Seward does not here assert any right founded on international however inconvenient or irritating to neutral nations; he entirely loses sight vast difference which exists between the exercise of an extreme right and the ission of an unquestionable wrong. His frankness compels me to be equally and to inform him that Great Britain could not have submitted to the perpe- on of that wrong, however flourishing might have been the insurrection in the , and however important the persons captured might have been.

y object in referring to this case, Mr. President, as I hope you will eive, is to point to it as an illustration of the case in which a nation itself outside international right, and where the only defence of osition must be that it considers itself morally justified in doing the g, and is prepared, if necessary, to fight in defence of having done That is not within the domain of international law, it lies entirely ide.

Again, take the case of the Revenue Laws—the Hovering Acts to are referred to in the argument, as if they afforded some justification the position of the United States as to self defence or self preser Upon what principle do those Acts rest? On the principle that no ilized State will encourage offenses against the laws of another the justice of which laws it recognizes. It willingly allows a fo State to take reasonable measures of prevention within a moderate tance even outside territorial waters; but all these offences, an offences of the same class and character relating to revenue an trade, are measures directed against a breach of the law contem to be consummated within the territory, to the prevention of an offe against the municipal law within the area to which the municipa properly extends. But it does not follow that all Acts of this kind in all cases meet with assent. It certainly would not, and could not expected to meet with assent, if the right were attempted to be exe cised—I use the word "right" in the laxer sense of the word: I wo prefer to say "if the Acts were attempted to be enforced",—at a con erable distance from land, and I affirm that in no such case by inter tional law, could it be maintained as of right against an objecting nat

As was said in the case my friend referred to in his Argument *Church* v. *Hubbart*, by Chief Justice Marshall, if the right is exte too far, it will be resisted; in other words, he considers that it is a qu right exercised by concession, and depending for its continued exist upon consent and upon the moderation with which it is used. indeed, as I read my friend Mr. Phelps' argument upon this poin seems to admit that that is the true view; because on page
1077 and 171 my friend dealing with one of the contentions adv on the part of Great Britain, says:

> An effort is made in the British Counter Case to diminish the force of the statutes, regulations and decrees above cited, by the suggestion that they on effect within the municipal jurisdiction of the countries where they are promu and upon the citizens of those countries outside the territorial limits jurisdiction.

Then my friend proceeds:

> In their strictly legal character as statutes, this is true. No authority ne been produced on that point. But the distinction has already been poi which attends the operation of such enactments for such purposes. Withi ritory where they prevail, and upon its subjects, they are binding as statutes, reasonable and necessary or not.

That is true: Then he goes on to say "without", that is to say, the territory:

> Without, they become defensive regulations, which if they are reasonabl essary for the defense of a national interest or right, will be submitted t nations, and if not, may be enforced by the government at its discretion.

You see, Mr. President, once you criticize and appreciate the l

, the nation has, in order to compel assent, the resort to force alone—hich is war. But I would like to say one thing, as I have drawn tention to this, although it is not strictly to the point upon which I n, but it is nevertheless sufficiently *ad rem* to justify my now alluding it. You will observe that in this paragraph my friend Mr. Phelps as recognized that the *territory* is the limit within which a municipal atute operates; and, therefore, he provides for the case of the United tates failing to establish territorial dominion, or territory over the area which their statutes have been adjudged to apply, and he is in effect aying that, although *quâ* statute it has no operation outside the territory, yet failing operation outside the territory it becomes a good, ffective, defensive regulation.

Now I have, upon that, to make two observations. I have to ask in he first place: Is there any precedent in any book of authority or in any international controversy in which a statute assuming to 078 exercise authority over a territorial area has ever been regarded as a protective or self-defensive regulation? That is the first uestion to which I would invite, when the proper time comes, my learned riend's answer—Is there any such case? Nay, I will suggest further hat the very idea of defensive regulation, or defensive act, or self-reservative act, repels the idea of cut and dried, formulated rules? The occasions for acts of self-defence, or self-preservation, are occasions f emergency—sudden emergency—occasions when there is no time (to se the expressive language of an eminent Statesman of the United States, to which I shall hereafter refer),—when there is no time for leliberation, no time for contrivance, no time for warning, no time for liplomatic expostulation. That is the very idea at the bottom of all hese exceptional acts of self-defence or self-preservation. But to say hat a statute which fixes its own penalties, including imprisonment, nd which is applied and intended to apply territorially, that is, within he dominion, is to be regarded, when the occasion of the State requires he argument to be turned that way, as a defensive regulation applica-le to the case of emergency, or falling within the principle of acts of lf-preservation, is, as far as I know, entirely and absolutely without y kind of authority.

Besides, let me remind you of a further difficulty, as I have touched on this point. The very constitution of an international Court implies at there is a question to be settled upon international principles—on the principle that the Court is not the Court of the captor only, t a Court which is charged with the care of, and the just adjudication on, matters affecting the rights of all nations, entirely and wholly art from the municipal law; and one of the first things which the dge of such a court would be called upon to consider would be the rcumstances of the case, the character of the emergency, and the char-ter of the sanction which by international law would follow upon the t done if it were not justified by the circumstances of the case. But re is a cut and dried statute, which tells the Judge that the conse-uences of the act on which he has to adjudicate are confiscation of the ip, imprisonment of the men—imprisonment not exceeding a definite rm—or imposition of a fine not exceeding a definite amount. This gument of self-defensive regulation is an ingenious afterthought: reditable to the subtlety of the minds which have invented it, but not defence which was present to their minds when this question was iplomatically in controversy between Great Britain and the United tates.

I have been drawn a little away, Mr. President, from the point which I was upon, although I think what I have said is still quite necessary to the line of the argument which I am pursuing.

I have already referred, Mr. President, to this question of the Hovering Acts, and I do not intend to repeat myself upon them except to make this comment: that—although many Powers have adopted Acts which may be called Hovering Acts, and although other States, especially those that have similar Acts, have recognized, have not
1079 complained of, have acquiesced in, acts done outside the territorial limits in defence of trade or revenue, acts done by other Powers under those Acts even where they involve the seizure of their own ships and subjects—yet I think it would be too much to say, even at the present day, that the principle of the Hovering Acts can properly yet be said to be part of international law: it really does rest now upon that principle of acquiescence which I have mentioned, and that acquiescence in its turn rests upon the principle that a nation will not interfere to throw the mantle of its protection over one of its nationals when that national has, for his own private ends, been running counter to a just and reasonable law of a friendly Power.

And I observe that that is the way in which these Hovering Acts are treated by text writers of authority. I refer to Dana's edition of Wheaton, the 8th edition published in 1866, and especially to the note 108, following upon the beginning of section 180; but I will not read the passage for the moment.

Now I will still pursue the question raised, as to certain things which are done with permission and acquiescence, whether or not they may be said to be strictly conformable to international law.

Take again the pursuit of vessels out of the territorial waters, but which have committed an offence against municipal law within territorial waters—which is a case which my learned friend and myself (and I have no doubt my learned friends on the other side), have had frequent occasion to consider. Here, again, there is a general consent on the part of nations to the action of a State pursuing a vessel under such circumstances, out of its territorial waters and on to the high sea.

Senator MORGAN.—You mean a consent by acquiescence?

Sir CHARLES RUSSELL.—A consent by acquiescence.

The PRESIDENT.—And not in every case?

Sir CHARLES RUSSELL.—No, certainly not in every case. I will state—although not perhaps exhaustively—some of the leading conditions. For instance, one condition is it must be a *hot* pursuit—that is to say, a nation cannot lie by for days or weeks and then say: "You weeks ago, committed an offence within the waters, we will follow you for miles, or hundreds of miles, and pursue you". As to that, it must be a *hot* pursuit, it must be *immediate*, and it must be *within limits of moderation*. In other words, we are still considering the character of the act which is not defined by International law, *which is not a state right by International law, but which is something which nations will stand by and see done, and not interpose if they think that the particular person has been endeavouring to commit a fraud against the laws of a friendly Power.*

Senator MORGAN.—That relates to the morality of the act.

Sir CHARLES RUSSELL.—To some extent, undoubtedly. The particular nation would undoubtedly be guided in its acquiescence or non-acquiescence according to its view of the morality or immorality of the particular conduct pursued—according to its view of the justice or injustice, reasonableness or unreasonableness, of the particular law.

080 I am of course here endeavouring to show that these various cases, quite dissimilar in their character, but all grouped together y my learned friend, are explicable upon different reasons. Some of he instances in the later cases which he gives, to which I am going to efer, are cases that fall within an entirely different category. They re acts either quasi-belligerent or actually belligerent, and fall within o rule of international law at all; they are acts which the nation does t its peril, taking the risk of having to defend them by force if they re challenged. They do not fall within any (what I may call) peace rinciple of international law.

Then again, take the case of sudden emergency, where there is somehing that may properly be considered as requiring instant action; as, or instance, those which are given by Azuni, where to avoid a greater langer, for example, the spread of fire, you may even destroy the proprty of another under the urgent necessity of the moment, where there s no time for precautionary measures, and the spread of the fire must be prevented: there you may act on the instant though by your act you destroy the property or invade the right of another. The case rests upon an entirely different principle.

But as regards those cases, as Mr. Webster, the American Minister, said in the case to which I shall presently refer, what a Government in such a case has to do in defending or excusing an act which is an invasion of the rights of another sovereign Power, is to "show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation."

That is the language of one of the most distinguished of the Ministers of the great American community.

Now in time of peace it will be found that the liberty conceded by consent of nations to maritime Powers as to exceptional acts of self-preservation is very closely restricted indeed; and here the simple inquiry is, how far can it be shown that civilized States have agreed to the exercise of a jurisdiction on the high seas under the plea of self-defence or self-preservation.

And I submit that it has never been suggested, still less agreed to y nations, that a particular Power may judge for itself of the inconenience it is suffering from the action of another Power on the high eas, and put down that action with a high hand. Any such general roposition is unsound. It may do it; but if it does it it does it as an ct which it must defend by force if challenged; it is not in the exercise f a legal right. It is a resort to the early sanction of force, and must e justified, if it be necessary, by force. And the restricted proposition hich we state, and by which we stand, is, that in such a case as the resent, where there was *no* such instant overwhelming necessity of elf-defence, where there *was* time for device of means, where there *was* me for deliberation, where there *was* time for diplomatic expostulation and representation, that it is idle to try to treat this case as 081 a case of necessary self-defence or self-preservation. For be it recollected that beyond the fact of the legislation, which was prossedly a territorial legislation, and a territorial legislation only: and eyond the fact of the seizures, which were made upon the basis of the ssertion of that territorial legislation, there was, before these seizures egan, no representation made to Great Britain by the United States hat she regarded this as a matter of national interest by which, right r wrong, they were determined to stand. And up to the present time ven there has been no such representation.

Their case has been based upon alleged right, and based upon right mainly and primarily upon the ground of extended territorial jurisdiction over the waters of Behring Sea. We say therefore the true proposition, the true limitation, in such cases, in times of peace, as between friendly Powers, is that there is no right by international law to seize the ships of another nation—I am excluding cases within the Hovering Acts, which I have already dealt with—that in time of peace there is no right to seize the ships of another nation on the high seas except for piracy.

The true limit of self-defence in time of peace.

I may be asked, finally, may there not be cases in which, although it may not be possible to formulate the interests of a nation under any recognized head of law, municipally or internationally regarded: yet may there not be cases in which there may be great interests of a nation which yet call for and morally justify that nation in acting, and acting in assertion of those interests and in defence of them? Yes; there are such cases; but what are they? They are cases which rest upon the very same principle upon which nations have been driven, sometimes justly, sometimes unjustly, to defend territory which they have acquired, or to acquire territory in which they have by international law no right, but which, either in pursuit of a great ambition, or in the gratification of racial antipathy, or under the influence of the ambition of a great potentate, they choose to think is necessary for the well-being and safety of the nation. But that is not international law, or international right. That is war, and is defended as war, and justified as war alone.

And I do not hesitate, Mr. President, to follow out this illustration to its conclusion. I do not hesitate to take the concrete case of these seals. It would be remarkable if they did it, they would be very unwise if they did it—extremely foolish if they did it—if I may respectfully say so. But the United States might choose to say:—We regard the interests of fur-sealing as of so great a magnitude, as of so much importance to the well-being of our great community, as so important to the advancing interests of civilization the world over, that we will assert, right or wrong, our claim against the world to protect the fur-seals in Behring Sea, or miles away from the Behring Sea.

But that would be war.

And there is another side to the question. Great Britain might choose to say:—We consider the interests involved in this question as
1082 very great and very important—not merely to the interests of the Canadians, to the interests of a rising colony; but in view of the broader and greater principle which we conceive to be involved, the interference with the eqality of all nations on the high sea, the attempt by one nation to usurp special privileges and special powers on the high sea. We consider that question to be of so great importance that we will defend it by force.

But that again is war.

That is not international law; that is not international right; and that is not the character of the question which this Tribunal has been invoked to determine. In this at least we are agreed: that as regards these questions which I am discussing (I have nothing to do with regulations at this moment) as regards these questions of legal right, we are to address you as lawyers would address judges, as advocates would address jurists.

In view of, and after, this general statement upon this matter, I now ask your consideration of the authorities cited by my learned friend; and you will see that they fall within one or other of the categories to which I have adverted, and

Examination of examples of acts of self-defence cited by United States.

are not cases of acts of defence or in the nature of acts of self preser vation, as suggested.

The first of these is at page 152, the case of Amelia Island, which occurred in the year 1810. This will be found to have been in effect belligerency. These are the facts; and I take them as they are put in the printed Argument of the United States.

Amelia Island, at the mouth of St. Mary's river,

Which I may say is off what is now the State of Florida

and at that time in Spanish territory, was seized in 1817 by a band of buccaneers under the direction of an adventurer named McGregor, who, in the name of the insurgent colonies of Buenos Ayres and Venezuela, preyed indiscriminately on the commerce of Spain and of the United States. The Spanish Government not being able or willing to drive them off, and the nuisance being one which required immediate action, President Monroe called his Cabinet together in October, 1817, and directed that a vessel of war should proceed to the island and expel the marauders, destroying their works and vessels.

Why, the mere statement of the case, as it is put here—not unfairly at all—by my learned friends, shows what the character of the case was.

I have before me the message of the President of the United States to Congress, in which he explains and justifies the action that is referred to in that case; and having read that, I shall not need to say more about it. Of course if I am relieved, as I should be delighted to be relieved, of any of these cases by the Tribunal, I shall pass on.

The PRESIDENT.—Not at all.

Sir CHARLES RUSSELL.—But I must deal with each of them unless I am so relieved.

1083 This was the message of President Monroe, delivered on the 13th of January, 1818. He says:

I have the satisfaction to inform Congress that the establishment in Amelia Island has been suppressed, and without the effusion of blood. * * * * By the suppression of this establishment and that of Galveston, which will soon follow, if it has not already ceased to exist, there is good cause to believe that the consummation of a project fraught with much injury to the United States has been prevented. When we consider the persons engaged in it, being adventurers from different countries, with very few, if any, of the native inhabitants of the Spanish colonies;—the territory in which the establishments were made, one on a portion of that claimed by the United States, westward of the Mississippi; the other on the part of East Florida, a province in negotiation between the United States and Spain;—the claim of their leader, as announced by his proclamation on taking possession of Amelia Island, comprising the whole of both the Floridas, without excepting that part of West Florida which is incorporated with the state of Louisiana;—their conduct while in the possession of the island, making it instrumental to every species of contraband, and in regard to the slaves, of the most odious and dangerous character;—it may fairly be concluded that if the enterprise had succeeded on the scale on which it was formed, much annoyance would have resulted from it to the United States.

Other circumstances were thought to be no less deserving of attention. The establishment of a government by foreign adventurers in the island, distinct from the colonial governments of Buenos Ayres, Venezuela, or Mexico, pretending to sovereignty and exercising its highest offices, particularly in granting commissions to privateers, were acts which could not fail to draw after them the most serious consequences. It was the duty of the executive either to extend to this establishment all the advantages of that neutrality which the United States had proclaimed and have observed in favor of the colonies of Spain, who, by the strength of their population and resources had declared their independence, and were affording strong proof of their ability to maintain it, or of making the discrimination which circumstances required. Had the first course been pursued we should not only have sanctioned all the unlawful claims and practices of this pretended government in regard to the United States, but have countenanced a system of privateering in the Gulf of Mexico and elsewhere, the ill effects of which might and probably would be deeply felt and very extensively felt. The path of duty was plain, from the commencement; but it was painful to enter upon it while the obligation could be resisted. The law of Bill, lately abolished, and which it is therefore proper now to mention, was considered applicable to the case, from the moment that the proclamation of the chief

of the enterprise was seen, and its obligation was daily increased by other considerations of high importance, already mentioned, which were deemed sufficiently strong in themselves to dictate the course which has been pursued.

Early intimations having been received of the dangerous purposes of these adventurers, timely precautions were taken by the establishment of a Force near the St. Mary's, to prevent their effect, or it is probable that it would have been more sensibly felt.

Then on the next page:

For these injuries, especially those proceeding from Amelia Island, Spain would be responsible, if it was not manifest that, although committed in the latter instance through her territory, she was utterly unable to prevent them. Her territory, however, ought not to be made instrumental through her inability to defend it to purposes so injurious to the United States. To a country over which she fails to maintain her authority, and which she permits to be converted to the annoyance of her neighbors, her jurisdiction for the time necessarily ceases to exist. The territory of Spain, will, nevertheless, be respected, so far as it may be done consistently
1084 with the essential interests and safety of the United States. In expelling these adventurers from these posts, it was not intended to make any conquest from Spain, or to injure in any degree the cause of the colonies. Care will be taken that no part of the territory contemplated by the law of 1811 shall be occupied by a foreign Government of any kind.

You will see at once what the case was.

Lord HANNEN.—Is not the substance of it this: There being no responsible Government to which recourse could be had for redress, direct war was made upon these people?

Sir CHARLES RUSSELL.—Certainly; and they were adventurers, usurping authority in two places, part attached to American territory, part attached to the State of Louisiana, with regard to which they were in negotiation with Spain, at the very time, for the acquirement of the territory, and which they afterwards acquired. They were, if I may use that expression, land pirates.

Mr. Justice HARLAN.—Sir Charles, it may be worth stating that under the Constitution of the United States only Congress can declare war.

Sir CHARLES RUSSELL.—That I had also recollected. It is important, undoubtedly, in that connection. I supposed it had declared war, though I do not know for certain.

Mr. Justice HARLAN.—I do not remember that it had.

Sir CHARLES RUSSELL.—It did not treat this party as a real belligerent. It treated it rather as a case of land pirates.

The PRESIDENT.—It was rather an act of military execution than of belligerency, I should say.

Sir CHARLES RUSSELL.—That may be so—quasi-belligerency, in point of fact, I suppose.

What I wish to point out is this. I am obliged to Mr. Justice Harlan for reminding me of what I in fact knew, that the assent of Congress is necessary to the conclusion of a Treaty and to a declaration of war; but whether it was war formally declared or not, I wish to point out that my learned friends, in citing this case, have themselves treated it as belligerent, because the sentence on page 152, begins with these words: "A *belligerent* may"—

The PRESIDENT.—That is a quotation from Mr. Wharton, I believe.

Mr. PHELPS.—All those quotations are from Mr. Wharton. They should be in quotation marks.

Sir CHARLES RUSSELL.—Very likely that is so. I accept it. What I am calling attention to is this:

A belligerent may under extreme necessity enter neutral territory and do what is actually necessary for protection.

And he cites the case of Amelia Island, in respect to which he says:

The PRESIDENT.—The last line is by Mr. Phelps, but I believe the two preceding lines are not.

1085 Mr. PHELPS.—Mr. Wharton's proposition is the first one, beginning,

Intrusion on the territory or territorial waters of a foreign state, etc.

Sir CHARLES RUSSELL.—Then Mr. Phelps, I think, agrees that these words are his.

A belligerent may, under extreme necessity, enter neutral territory and do what is actually necessary for protection.

Mr. Justice HARLAN.—Is that yours, Mr. Phelps, or Mr. Wharton's?

Mr. PHELPS.—Mr. Wharton's.

Sir CHARLES RUSSELL.—Are you quite sure, Mr. Phelps?

Mr. PHELPS.—I am quite sure.

Sir CHARLES RUSSELL.—It is enough then to say I have not the weight of the authority of my friend Mr. Phelps; I have only the authority of Mr. Wharton, and he treats it as a belligerent act. I am sorry I have not both; but I shall be content with one.

But whether war was formally declared or informally declared, the acts were in the nature of belligerent acts, directed to putting down the persons who were assuming, without authority, jurisdiction, and who were committing acts, as I have said, of land piracy. That is practically all that one can say of it.

The next case cited is the case of the Caroline, on page 153. That was a case where there was, or had recently been, an actual rebellion in Canada. What happened was this: It appears from the correspondence, which I shall presently refer to, that this vessel, the Caroline, was armed by a number of persons acting in sympathy with the rebellion. These persons got the vessel to the river which connects Lake Erie with Lake Ontario.

The flow of the water is from Lake Erie into Lake Ontario, and Lake Erie divides Canadian from United States territory. They got this vessel, intending to use it as an offensive weapon against Canada, into the river which unites Lake Erie with Lake Ontario, and they got to the side of the river next to American territory. In that condition of things the Canadian authorities sent down an armed force, took possession of the vessel, and being unable to take her away, they destroyed her as being an engine of offence directed against her. My friend Mr. Box has been good enough to give me a short note which he has extracted from a parliamentary paper which I have here, and which I have read, but the note gives the facts. The case of the United States is set out in a despatch from Mr. Stevenson to Lord Palmerston, dated the 22nd of May 1838.

According to this despatch, there was an insurrection in Canada. The Caroline was an unoffending United States vessel. She was seized in a United States port, set on fire, and sent over the falls of Niagara. That is the statement of Mr. Stevenson.

The British case, on the other hand, is set out in a despatch from Lord Palmerston to Mr. Stevenson, dated the 22nd of August,

1086 1841. According to Lord Palmerston's account of the facts, a small band of Canadian refugees, who had taken shelter in the state of New York, formed a league with United States citizens for the purpose of invading British territory, not to aid in the civil war, which did not exist, as Lord Palmerston contended, but to commit in British territory robbery, arson and murder. At the United States port of Schlosser, with the connivance of the authorities there, the Caroline

obtained munitions of war from the public stores, some of which were conveyed to Navy Island, in British territory, for the above uses. The British boat surprised the vessel in Schlosser harbor at night, removed the crew, set it on fire, and let it drift over the Falls. Mr. Webster, who then was the Minister of State, writes in reference to this matter the language which I have quoted; at a later stage of the diplomatic discussion, and repeating his view of the facts, says:

> Under those circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show upon what state of facts and what rules of international law the destruction of the Caroline is to be defended. It will be for that Government to show a necessity of self defence, instant, over-whelming, leaving no choice of means and no moment for deliberation.

It is set out at page 186 of the printed Argument, in which this case is referred to.

I have only finally to read the justification which Lord Palmerston put forward for the act, with which explanation the United States was content, and did not pursue the matter further. The despatch from Lord Palmerston is dated the 27th August, 1841, and is set out at page 56 of the correspondence relating to this matter. He gives the statement and facts which I have endeavored to summarize.

The PRESIDENT.—We have not got that.

Sir CHARLES RUSSELL.—No, I shall hand this to the Tribunal if they so desire it. It is upon a matter upon which there is no dispute as to fact. I am reading historical documents. Lord Palmerston goes on, after stating the facts very much as I have described them, and says:

> In this state of things a small band of Canadian refugees, who had taken shelter in the State of New-York, formed a league with a number of citizens of the United States for the purpose of invading the British territory, not to join a party engaged in civil war, because civil war at that time in Canada there was none, but in order to commit within the British territory the crimes of robbery, arson, and murder.
>
> Her Majesty's Government, and Her Majesty's Minister at Washington have called these people pirates, and the American secretary of State in a recent note to Mr. Fox observes, that this name cannot properly be applied to them. The Undersigned is ready to admit that technically, the word "pirate" is applied to persons who, without authority or commission, commit upon the high seas the crimes which this band of offenders determined to commit upon the land; but if the term is in this case inappropriate, it is so, not on account of the nature of the acts which these men were about to perpetrate, but on account of the element on which those acts were to be committed—

And then he concludes:

> That there was no fortification at Schlosser—

1087 That is the place where the ship was seized.

> Her Majesty's Government are ready to admit; for though the place is called Fort Schlosser, Her Majesty's Government believe that no fortified building at present exists there. It is also perfectly true that no hostilities had been commenced on the American side, if by that expression Mr. Stevenson means the American side of the river; but that hostilities had been commenced by the Americans is now an historical fact, and those hostilities consisted in an invasion of British territory by an armed force from the state of New-York. In fact, the people of New-York had begun to make war against Her Majesty's Canadian Provinces. They had done so apparently with the connivance of the Authorities of the State; not only the New-York territory at Schlosser had lost its neutral character, and had become enemies' land, but other portions of the territory of that State had assumed the same condition.
>
> One or other of two things must be. Either the Government of New-York knowingly and intentionally permitted the band of invaders to organize and equip themselves within the State, and to arm themselves for war against British territory, out of the military stores of the State; or else the State Government had lost its authority over the border districts; and those districts were for the moment in open defiance of the power of the State Government, as well as at war with the opposite British province.

the nation has, in order to compel assent, the resort to force alone—ich is war. But I would like to say one thing, as I have drawn ention to this, although it is not strictly to the point upon which I , but it is nevertheless sufficiently *ad rem* to justify my now alluding it. You will observe that in this paragraph my friend Mr. Phelps s recognized that the *territory* is the limit within which a municipal tute operates; and, therefore, he provides for the case of the United ates failing to establish territorial dominion, or territory over the area which their statutes have been adjudged to apply, and he is in effect ying that, although *quâ* statute it has no operation outside the terri-y, yet failing operation outside the territory it becomes a good, ective, defensive regulation.

Now I have, upon that, to make two observations. I have to ask in e first place: Is there any precedent in any book of authority or in any international controversy in which a statute assuming to 78 exercise authority over a territorial area has ever been regarded as a protective or self-defensive regulation? That is the first estion to which I would invite, when the proper time comes, my learned end's answer—Is there any such case? Nay, I will suggest further at the very idea of defensive regulation, or defensive act, or self-eservative act, repels the idea of cut and dried, formulated rules? he occasions for acts of self-defence, or self-preservation, are occasions emergency—sudden emergency—occasions when there is no time (to e the expressive language of an eminent Statesman of the United tates, to which I shall hereafter refer),—when there is no time for liberation, no time for contrivance, no time for warning, no time for plomatic expostulation. That is the very idea at the bottom of all ese exceptional acts of self-defence or self-preservation. But to say at a statute which fixes its own penalties, including imprisonment, d which is applied and intended to apply territorially, that is, within e dominion, is to be regarded, when the occasion of the State requires e argument to be turned that way, as a defensive regulation applica-to the case of emergency, or falling within the principle of acts of f-preservation, is, as far as I know, entirely and absolutely without y kind of authority.

Besides, let me remind you of a further difficulty, as I have touched on this point. The very constitution of an international Court implies t there is a question to be settled upon international principles—on the principle that the Court is not the Court of the captor only, t a Court which is charged with the care of, and the just adjudication on, matters affecting the rights of all nations, entirely and wholly rt from the municipal law; and one of the first things which the dge of such a court would be called upon to consider would be the cumstances of the case, the character of the emergency, and the char-er of the sanction which by international law would follow upon the done if it were not justified by the circumstances of the case. But re is a cut and dried statute, which tells the Judge that the conse-ences of the act on which he has to adjudicate are confiscation of the ip, imprisonment of the men—imprisonment not exceeding a definite rm—or imposition of a fine not exceeding a definite amount. This gument of self-defensive regulation is an ingenious afterthought: editable to the subtlety of the minds which have invented it, but not defence which was present to their minds when this question was plomatically in controversy between Great Britain and the United tates.

The PRESIDENT.—It is not necessary for your case to settle whether that is an act of legitimate self-defence.

Sir CHARLES RUSSELL.—That is what Lord Ashburton said.

The PRESIDENT.—I think that is perfectly right. I believe he is more moderate and appropriate in his terms than Lord Palmerston was.

Sir CHARLES RUSSELL.—Lord Palmerston was a man who used strong language, or at all events had the credit of doing so.

The PRESIDENT.—Well I suppose if you say so there was no harm in my saying what I did.

Adjourned till to-morrow at 11.30.

TWENTY-EIGHTH DAY, MAY 26TH, 1893.

Sir CHARLES RUSSELL.—Mr. President, I wish to recall to the minds of the members of the Tribunal the subject we are discussing, and the position that it holds in the main argument in the case. I have dealt, as the Tribunal will remember, with the alleged claims of property in the seals and of an alleged invasion of right as regards the industry; and I have endeavoured to establish, and I hope have established, that there was neither property in the seals, nor any right to the industry invaded by pelagic sealing; and, therefore, I have stated that if there were no rights which called for or authorized protection or justified protection, it was not necessary to discuss, or essential to discuss, what would have been the rights of protection had property in fact existed, or had the rights of the industry in fact been invaded. But it is, nevertheless, not without importance to follow my learned friend's line of argument and illustrations as set out in this Argument, in order to see whether it affects in any way the truth of the proposition that the pacific rights of nations, that is to say the rights of nations in time of peace, against ships of a friendly Power on the high seas, are of an exceedingly restricted and narrow kind. We must assume that the industry exists, and that my learned friends have produced in argument the cases which they believe are most in point to establish their view of what the rights of self-preservation and of defence will justify nations in resorting to in time of peace. Therefore, it cannot be said, I think, that the time is wasted in discussing, as I must do, these cases.

I had referred to the case of the "Caroline"; I have only further to say, in relation to it, that from the standpoint from which I am asking you to consider the question, it is entirely unimportant whether you are to take the ground upon which Lord Palmerston, in the early part of the correspondence, based the action of the British Government, namely that it was an act done to put down a body of marauders who were contemplating offensive operations on British territory, or whether you are to adopt, as Lord Ashburton did, the formula put before him, or suggested to him, by Mr. Webster when he used that emphatic language pointing out that the strict emergency of the case could alone justify any exceptional measures.

I conclude my reference to the subject by citing the fact that Lord Ashburton finally made a kind of apologetic statement, and that is rather significant in regard to the matter, showing that he regarded it on the border line. Chancellor Kent in his "International Law" referring to the matter (at page 148 of the 2nd edition by Mr. Abdy) says this:

> Her Majesty's Government having stated their regret at the violation of territory complained of, and at the omission, or neglect, to explain and apologize for that violation at the time of its occurrence.

1090 And so forth.

The matter was then allowed to drop.

Mr. PHELPS.—Were you reading the language of Chancellor Kent or Mr. Abdy the editor?

Sir CHARLES RUSSELL.—This is the original text. It is noticeable also that Lord Campbell who filled very high judicial offices in England—at one time he was Lord Chief Justice after having been Attorney General, and he was afterwards Lord Chancellor—that he, in reference to the case, (and this is noted at page 187 of my learned friend's Argument) refers to the affair of the "Caroline" as being a difficult matter, and he then goes on to say:

Even Lord Grey told me he thought we were quite wrong in what we had done.

And he goes on to say, assuming the facts to be as he states, that he, Lord Campbell, thinks it was justifiable. I read this for this purpose. It makes very little for my learned friend's contention to cite isolated cases in which things have been done by particular Governments and in particular circumstances, and to show that those Governments sought to justify what they had done under international law: the fact that they sought to justify it under international law would not prove that it was international law.

A large number of cases of that kind, acquiesced in by different Governments, might go, according to the extent and the number of instances and the period of time over which they extended—the general acquiescence and consent would go, according to the volume and importance of the cases, a certain way to prove what was international law: but isolated instances would not.

The next case my learned friend refers to is at page 153 of the printed book. That is the case of the fort on the Appalachicola river. This was a case, shortly stated, of putting down a band of marauders. I should have said that in every one of these cases we have tried to get at the original documents; if it be a United States case, at the United States documents; if it be a British case, at the British documents. This was a United States case, and I will refer for a moment to what is said in the argument about it. I will first read the account in the United States Argument.

In 1815, under orders of Mr. Monroe, measures were taken for the destruction of a fort held by outlaws of all kinds on the Appalachicola River, then within Spanish territory, from which parties had gone forth to pillage within the United States. The governor of Pensacola had been called upon to repress the evil and punish the marauders, but he refused; and on his refusal the Spanish territory was entered and the fort attacked and destroyed, on the ground of necessity.

Now I take the original United States documents; and I refer first to the communication from the acting Secretary of War, George Graham, to General Gaines. I am reading from page 1140 of the United States Official Papers:

The papers have been submitted to the President, and I am instructed by him to inform you that he approves of the movement of the troops from Fort Montgomery to Fort Scott. The appearance of this additional force, he flatters himself, will at least have the effect of restraining the Seminoles,

1091 those are the Seminole Indians, with whom the United States was at that time at war,

from committing farther depredations, and perhaps of inducing them to make reparation for the murders which they have committed. Should they, however, persevere in their refusal to make such reparation, it is the wish of the President that you should not *on that account* pass the line and make an attack upon them within the limits of Florida until you shall have received further instructions from this Department.

And, on page 1141, there is a further communication to the same gentleman commanding the United States forces:

Should the Indians, however, assemble in force on the Spanish side of the line *and persevere* in committing hostilities within the limits of the United States, you

will in that event exercise a sound discretion as to the propriety of crossing the line for the purpose of attacking them and breaking up their towns.

The proclamation of General Jackson on the 29th of May, 1818, completes all I need trouble you with in this connection. This is the Proclamation:

Major-General Andrew Jackson has found it necessary to take possession of Pensacola.

He has not been prompted to this measure from a wish to extend the territorial limits of the United States, or from any unfriendly feeling on the part of the American Republic to the Spanish Government. The Seminole Indians inhabiting the territories of Spain have, for more than two years past, visited our frontier settlements with all the horrors of savage massacre. Helpless women have been butchered, and the cradle stained with the blood of innocents. These atrocities, it was expected, would have early attracted the attention of the Spanish Government and, faithful to existing Treaties, speedy measures adopted for their suppression. But so far from being able to control, the Spanish authorities were often compelled, from policy or necessity, to issue munitions of war to these savages; thus enabling, if not exciting, them to raise the tomahawk against us.

That is his justification. I need not point out that that is a state of war.

Mr. PHELPS.—You do not mean that that is the transaction that is referred to in my Argument; that is three years later—the occupation of Pensacola for a different reason.

Sir CHARLES RUSSELL.—Yes, this is the occupation of Pensacola that I have been reading.

Mr. PHELPS.—But it is some years after. I do not object to your reading it, of course.

Sir CHARLES RUSSELL.—I assure you it is part of the story and the same transaction. It begins on October 17th, or at least the earliest communication I have read is then, and the proclamation of General Jackson, after the attack, is on the 29th May, 1818. The mistake that my learned friend has fallen into, with great deference is, that it is not 1815 but 1817. I think that my learned friend will find we are right in that.

1092 We have had a careful search made through the whole of the American papers of the time, and that is the only one which we can identify as being referred to in this Argument. But whatever the time may be, my learned friend, I think, will not deny that the statement in his Argument that it was "held by outlaws of all kinds on the Appalachicola River, then within Spanish territory, from which parties had gone forth to pillage within the United States" relates to the Seminole Indians to whom I have referred. About that there can be no doubt.

Now the next case which my learned friend refers to is at the bottom of the same page:

A similar case was that of Greytown. It was a port on the Mosquito coast, in which some United States citizens resided. These citizens, and others interested with them in business, were subjected to gross indignities and injuries by the local authorities, who were British, but who professed to act from the authority of the king or chief of the Mosquito Islands. The parties then appealed to the commander of the United States sloop of war *Cyane*, then lying near the port, for protection. To punish the authorities for their action he bombarded the town. For this act he was denounced by the British residents, who claimed that the British Government had a protectorate over that region. His action was sustained by the Government of the United States, the ground being the necessity of punishing in this way the wrong to the citizens of the United States, and preventing its continuance.

Now, here again, we have the Official Papers. The United States President, at that time Mr. Franklin Pierce, in his Message to Congress explains this occurrence. He says, after referring to the position of

American interests in Central America, and to the necessity for establishing inter-oceanic communication across the Isthmus—

A Company was organized under the authority of the State of Nicaragua, but composed for the most part of citizens of the United States, for the purpose of opening such a transit way by the River San Juan and Lake Nicaragua, which soon became an eligible and much-used route in the transportation of our citizens and their property between the Atlantic and Pacific.

Meanwhile, and in anticipation of the completion and importance of this transit-way, a number of adventurers had taken possession of the old Spanish Port at the mouth of the River San Juan in open defiance of the State or States of Central America, which, upon their becoming independent, had rightfully succeeded to the local sovereignty and jurisdiction of Spain. These adventurers undertook to change the name of the place from San Juan del Norte to Greytown; and though at first pretending to act as the subjects of the fictitious Sovereign of the Mosquito Indians, they subsequently repudiated the control of any Power whatever, assumed to adopt a distinct political organization, and declared themselves an independent Sovereign State.

Then he goes on:

At a later period, they organized a strong force for the purpose of demolishing the establishment at *Punta Arenas;* but this mischievous design was defeated by the interposition of one of our Ships of War at that time in the Harbour of San-Juan. Subsequently to this, in May last, a body of men from Greytown crossed over to Punta Arenas, arrogating authority to arrest on the charge of murder a
1093 captain of one of the steamboats of the Transit Company. Being well aware that the claim to exercise jurisdiction there would be resisted then, as it had been on previous occasions, they went prepared to assert it by force of arms. Our Minister to Central America happened to be present on that occasion.

And he proceeds to state how he was threatened upon American territory; and thereupon they proceeded to bombard the town in which these people took refuge; and he says finally:

This pretended community, a heterogeneous assemblage, gathered from various countries and composed for the most part of blacks and persons of mixed blood, had previously given other indications of mischievous and dangerous propensities. Early in the same month, property was clandestinely abstracted from the depot of the Transit Company and taken to Greytown. The plunderers obtained shelter there, and their pursuers were driven back by its people, who not only protected the wrongdoers and shared the plunder but treated with rudeness and violence those who sought to recover their property. Such, in substance are the facts.

And so on.

And, finally, he describes it as a place which they were justified in bombarding,

it was in fact a marauding establishment too dangerous to be disregarded, and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws, or a camp of savages, depredating on emigrant trains or caravans and the frontier settlements of civilized States.

The bearing of their illustration upon the question of seizing and confiscating a ship because it caught or was about to catch a seal, half a dozen seals or a dozen seals,—I suppose the number makes no difference—seems somwhat remote.

The PRESIDENT.—Have you official statements of the view of the British Government on that business?

Sir CHARLES RUSSELL.—I am not sure.

The PRESIDENT.—It was invoked as a protector; and it would be interesting to know what was the view of the British Government as to that.

Sir CHARLES RUSSELL.—I will see if I have the document. We have a despatch which I have not read, and I will go through it.

The PRESIDENT.—It may be of interest in their view of the question.

Sir CHARLES RUSSELL.—Yes. I should think it exceedingly likely

iat they thought that the United States Government had gone a great eal too far; but I will read the despatch in a moment.

Now on page 154 you will find a reference, which will be easily ppreciated, to the Orders in Council of 1809. This is touching on a ery sore subject, though its soreness has been somewhat mitigated by me. One great Power was at war, practically, with a combination of ther European Powers, and the Emperor Napoleon had prohibited ritish commerce with certain neutral ports; and, as a retaliatory easure of war, British Orders in Council were issued exactly in the ime way as had been done by Napoleon: there was a similar interdiction: it was act against act: the Powers were involved in a
94 struggle for mastery, each doing what it could to minimise the enemy's powers of resistance and attack. What light it throws i this matter I confess I do not know, but I do observe that when the rders in Council were brought before prize courts for adjudication, ie exceptional character of these Orders in Council was recognized; r I see at page 155 of the Argument of the United States my friend ites, with great fairness, from Lord Stowell, then Sir William Scott:

Again, speaking of those retaliatory measures as necessary for the defense of ommerce, he says in another case:

In that character they have been justly, in my apprehension, deemed reconcilable rith those rules of natural justice by which the international communication of idependent States is usually governed.

And immediately before that he says:

When the State, in consequence of gross outrages upon the laws of nations comitted by its adversary, was compelled by a necessity which it laments, to resort to ieasures which it otherwise condemns, it pledged itself to the revocation of those ieasures as soon as the necessity ceases.

And this again was war. They were engaged in what may be escribed as a death struggle.

Now, Mr. President, I come to a reference on page 155 which is of nite a different character, introduced here strangely out of its order s it seems to me. It is a statement, and, as we conceive, an entirely isleading statement as to the views asserted by Great Britain in lation to rights of fishery off the coast of Newfoundland and Nova cotia. At best it would be an *argumentum ad hominem;* but it is so riously in error in point of fact that I think it is well that the matter ould be fully, clearly, and chronologically put before this Tribunal. say so all the more because, in relation to this matter of the Newindland fishery, Mr. Phelps on page 157 of his argument says:

f the countries now contending were right then,

at is to say, in reference to the fishery claims on the east coast of merica, and on the coasts of Newfoundland and Nova Scotia.

the views entertained by both governments and by all who were concerned for em, in cabinets, diplomacy, Congress, and Parliament, and in the claims then ide, conceded and acted upon ever since, the precedent thus established must be cisive between them in the present case. There cannot be one international law r the Atlantic and another for the Pacific. If the seals may be treated, like the h, as only *feræ naturæ*, and not property, if the maintenance of the herd in the ribilof Islands is only a fishery, how then can the case be distinguished from that the fisheries of Nova Scotia and Newfoundland? Why would it not be, until nceded away by treaty or thrown open to the world by consent, a proprietary ght belonging to the territory to which it appertains, and which the Government s a right to defend?

I have to say, in the first instance, that I accept the challenge
95 which is covered by that statement. We do not insist, and I shall prove we have not insisted, on a different law, or upon

different principles of law in relation to the subject-matter her referred to, from those that we are insisting upon in this controversy to-day; and that we should be quite content to have the law which applies and exists, and the rights that are claimed in respect of the fisheries of Newfoundland and Nova Scotia, applied to the controversy which we are here engaged upon.

Now, I would like to remind the Tribunal shortly (for I must be pardoned for dealing with this a little exhaustively), how this matter arises. When America (that which is now the United States, or part of it), was a Colony of Great Britain, Great Britain had entered into certain Treaties with Spain and with France, under which Treaties unquestionably there were conceded to Great Britain fishing rights over a considerable extent of the sea beyond the 3-mile territorial limit. It is not *ad rem* to go into the history of those Treaties. It is enough to say that those extended rights as between those Powers, parties to the Treaties, were given by the Treaties, in other words, by Convention and Agreement of the parties. In 1776 the American Independence was declared; and, following that Declaration of Independence and after the War of Independence, the Treaty of 1783 was entered into between Great Britain and the new independent Sovereign Power, now the United States. I first call your attention to what that Treaty was.

I wish to remind you, before I refer to it, that my friend Mr. Carter, no doubt with Mr. Phelps' Argument before him, asserted a contention based upon the statements contained in the Argument. On the 21st of April, on pages 492 and 493 of the printed report will be found my friend Mr. Carter's argument.

Now I have instanced the Pribilof Islands. Take the fisheries on the banks of Newfoundland, which are also another illustration of that. I will not say that they are a full and perfect illustration, but they will answer for the purpose of my argument. Great Britain asserted, at an early period, an exclusive right to the fisheries on the Newfoundland banks because she had created a national industry which was engaged in, and sustained, by her subjects resorting to those banks for the purpose of gathering fish. And she claimed that the carrying on of that industry was a property of hers. Upon the United States gaining its independence, the United States asserted a right to participate in those industries. They said, "We were a part of Great Britain originally, and, indeed, were the people who went there and created this industry; but, having gained our independence, we have not lost our right to carry on this fishery". That right was denied, and an attempt to exclude them was still maintained, it being admitted on both sides that it was an industry to which each nation had a peculiar claim, Great Britain insisting it was her own and that the United States had no right to it, and the United States going on the ground that it was a national industry, and that they had a right to participate in it, because they were one of the original creators of it. There are numerous other cases of laws passed by Great Britain for the purpose of protecting the Herring Fisheries, and so on.

The PRESIDENT.—Are those fisheries exclusive of other nations than American and English?

Mr. CARTER.—I do not think they are practically asserted now as being exclusive of other nations; but they were originally, and there were contests with other
1096 nations for the possession. They tend to illustrate my argument only; in the particular case they were not defensible, but they illustrate the view. The correspondence is printed in our Argument which fully supports it.

The PRESIDENT.—But if the exclusive right was not maintained?

Mr. CARTER.—It was maintained for a while; but I do not think it has been maintained down to now.

Thereupon, my learned friend, Mr. Phelps, interposes and expresses his dissent from that, and intimated, as I gathered from him (he will correct me if I am wrong) that he meant to say in some sense or other that assertion was doubted.

Mr. PHELPS.—What I said was, our fishery rights now are derived under the Treaty of 1779.

· CHARLES RUSSELL.—That goes without saying; that is not the

. PHELPS.—Not as a right; but as under the Treaty with Great in.

· CHARLES RUSSELL.—There are certain fishing rights, undoubt- that the United States have under the Treaty with Great Britain. is true; I am going to show what they are, and that they are in orial waters; and also that outside territorial waters the United s has those rights not under Treaty at all, but as a recognized of the general right of mankind, and I will justify this by refer- to the Treaty which is before me. I understand my friend Mr. ps did not mean to intimate that he was differing from Mr. Carter hat there was, now, asserted any right inconsistent with the gen- right of all mankind to fish in extra-territorial waters.

. PHELPS.—What I meant to say was that the question having decided by Treaty between Great Britain and the United States, right of fishing in the open sea had never come up as an actual tion since, that I know of.

ere has been great discussion about territorial rights. The case is for the purpose of showing that it was claimed and conceded on sides that the fishery to a great distance out into the sea belonged reat Britain as an appurtenance to its territory.

· CHARLES RUSSELL.—That is a little different from the way in h it is put in the case; nor is it the historical fact. I will show the exact case is in a moment, but my friend will see that in page of his Argument he puts it differently.

s says at the bottom of page 156:

> on this view entertained by both nations and by all the eminent diplomatists tatesmen who participated in making or discussing these treaties, the conten- urned upon the true construction of the grant of fishing rights contained in eaty of 1783. It was claimed by the British Government that this was a pure of rights belonging exclusively to Great Britain, and to which the Americans have no claim, except so far as they were conferred by treaty.

hall show that that is not so. Then my learned friend goes on:

> It was contended on the other side, that the Americans, being British subjects up to the time of the Revolutionary War, entitled and accustomed as such to share in these fisheries, the acquisition of which from France had been largely o their valour and exertions, their right to participate in them was not lost by evolution, nor by the change of government which it brought about, when con- ated by the treaty of 1783. And that the provisions of that treaty on the sub- ere to be construed, not as a grant of a new right, but as a recognition of the ican title still to participate in a property that before the war was common to countries. Which side of this contention was right it is quite foreign to the at purpose to consider. It is enough to perceive that it never occurred to the d States Government or its eminent representatives to claim, far less to the h Government to concede, nor to any diplomatist or writer, either in 1783 or to conceive, that these fisheries, extending far beyond and outside of any limit ritorial jurisdiction over the sea that ever was asserted there or elsewhere, the general property of mankind, or that a participation in them was a part e liberty of the open sea. If that proposition could have been maintained, the of the Americans would have been plain and clear.

ow that is an entire misconception, as I conceive. In the first ance, let me point out that so far as any special rights were con- d by France—I have told the Tribunal there were such—they were eded by Treaty. So as regards Spain; but those Treaties only d Spain and only bound France, and would not have interfered iota with the right of any other nation over the area affected by n. It bound them and bound them only. But here is the Treaty 783 to speak for itself, and you will see that it recognizes the right

to fish in the non-territorial waters; but that it concedes to the United States certain rights in the territorial waters, and that the only dispute that has existed between the United States and the Government of the Queen has been, since those Treaties, as to the interpretation of portions of it which relate to bays and so forth—how they were to be construed and how their limits were to be defined. That arises under a Treaty of 1818, to which I shall come presently.

Mr. PHELPS.—I quite agree Sir Charles with your construction of the Treaty of 1783. What I cite is the opinions given on both sides at the time they were negotiating.

Sir CHARLES RUSSELL.—I do not understand really how my friend, consistently with what I have just read, can say that he agrees with it, unless he means to retract that argument as it appears in the printed Argument.

In order that what I am now about to read may be intelligible to the Tribunal—I am sorry to have to go into it in detail, but I wish to clear it up and make it quite apparent what the true position of things is,—I may say that after that Treaty of 1783, there was, as the Tribunal will recollect, at a later period, in 1812, a war with the United States, that war arising out of an attempt to take British sailors from American ships, which was resisted by the United States; the war ended by the Treaty of 1818, known as the Treaty of Ghent. I am going to refer now to the Treaty of 1783, after the Declaration of American Independence; article 3 is as follows:

1098 ARTICLE III.

It is agreed that the people of the United States shall continue to enjoy unmolested the right:

1. To take fish of every kind on the Grand Bank and all the other banks of Newfoundland.

2. Also in the Gulf of St. Lawrence.

3. And at all other places, in the sea, where the inhabitants of both countries used at any time heretofore to fish. And also, that the inhabitants of the United States shall have liberty:

You note the difference between the two.

1. To take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island).

In other words, the right is acknowledged to take the fish outside non-territorial waters. *Inside* the territorial waters the liberty is given, under this Treaty, to take fish of every kind and to use them as British fishermen may use them, except that they are not to have the right of landing on the island for the purpose of curing.

Then it says:

2. And also on the coasts, bays and creeks of all other of His Britannic Majesty's dominions in America.

3. And that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said fishermen to dry and cure fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground.

Now how was this Treaty regarded by the United States people themselves? I refer here again, as I have always tried to do all through, to official documents as to which there can be no doubt, and for this purpose I refer to the Report of the Committee of Foreign Affairs of the

ɔuse of Representatives, of January 18th 1887; and referring to this eaty, they say:

t will be observed that this Article, in continuing, confirming, and establishing thirteen States and their inhabitants in the taking of fish on the banks, in the f, and in the sea, uses the word "rights"; but uses the word "liberty" in con- ing to American fishermen the taking of fish on the coasts, bays, and creeks of ry part of the British dominions in America. The word "rights" is thus applied shing in the open sea, which by public law is common to all nations, and was nded to affirm that Great Britain did not claim to hold by Treaty engagements, n any other manner, any exclusive right of fishing therein. The word "lib- " is thus applied to taking fish, to drying and curing fish, on what was, anterior he Treaty, within the jurisdiction, or territorial waters, of Great Britain, but an usive right of taking fish therein was not hers. "Liberty", as thus used, implies sedom from restraint or interference in fishing along the British coasts.

The distinction you see, therefore, is plainly and clearly drawn 9 by the American representatives themselves. Again, at a later page, page 38 of the same Report they say:

ngland contended that the word "right" in the Treaty of 1783 was used as applie le to what the United States were to enjoy in virtue of a recognized independ- e, and the word "liberty" to what they were to enjoy as concessions strictly endent on the existence of the Treaty in full force, which concessions fell, as gland asserted, on the declaration of war by the United States, and would not be ived excepting for an equivalent.

Therefore, so far away as 1812 the contest between the United States d Great Britain took this form. Great Britain said: so far as the fishing non-territorial waters is concerned, you have the same rights at Brit- ı subjects have, and as all the world has; but as regards these special erties which were given to you under the Treaty of 1783, which abled you to come into territorial waters, and into the creeks and ıces where you would not otherwise have a right—as regards those ıich are given to you by the Treaty, your title to which is by the eaty; those rights are annulled by the fact of war, which has, by ternational law, put an end to the Treaty.

I might almost leave the matter there, but it is perhaps better that I ould go through it. I have read what the Representative Committee the United States said in 1787. In 1788 the Senate Committee on ɔreign Relations, referring to the Treaty of 1783, reported in these ɔrds. My learned friends probably have the reference to the docu- ent. It is N° 109 of the fifth Congress, first session, page 2, Miscel- neous Documents. They there report as to the open sea fishing. It ıs merely a recognition of a right common to all nations, and as to e fishing on the coasts, bays and creeks within the municipal dominion His Majesty. It was an averment that these rights, theretofore exist- g in all British subjects, should have belonged as of right to those itish subjects who by the rebellion had become the citizens of an inde- ndent nation. You observe therefore the recognition of the view ıich I am now putting before you. I am reading these out of order date, because they refer back to the Treaty of 1783. There was the ır of 1812, the Treaty of Peace of 1815, and the Fishery Treaty of 18. The document is to be found in the 3rd volume of Wharton's gest of International Law, at page 304. In 1814 Commissioners from 'eat Britain and the United States met at Ghent for the purpose of ening negotiations for peace. What I am about to read is an extract ɔm the instructions given to the British Commissioners on the subject the fisheries that will present the view on both sides of the question. ıese are of the 28th July, 1814, State Papers, volume 1, page 1543:

But the point upon which you must be quite explicit from the outset of the nego- ıtions is the construction of the Treaty of 1783 with relation to the Fisheries. You

will observe that the 3rd Article of that Treaty consists of two distinct branches.

The first which relates to the open sea fisheries we consider of permanent obli-
1100 gation, being a recognition of the general right which all nations have to frequent and take fish on the high seas. The latter branch is, on the contrary, considered as a mere conventional arrangement between the two States, and as such to have been annulled by the war. You will see it is an entirely erroneous view to suggest that at any time and in any part of this discussion, Great Britain was asserting that the open sea was not open to all mankind as between the United States and herself, or that she was conferring upon the United States a privilege which she did not have as a general right.

The matter is important, but I am afraid I am wearying the Tribunal by reading too much.

The PRESIDENT.—Well, it is a weighty comparison and of great interest.

Sir CHARLES RUSSELL.—I read now from the communication from Lord Bathurst, the then Foreign Secretary of Great Britain, 30th October, 1815. I am reading from the volume of the American State Papers, Class 1, Foreign Relations, vol. 4, page 355. Mr. John Quincy Adams was then Secretary of State for the United States, and Lord Bathurst is addressing him on the position of affairs. The date of the title page is 1834.

Mr. PHELPS.—We have the book, I understand.

Sir CHARLES RUSSELL.—No doubt.

But the rights acknowledged by the Treaty of 1783 are not only distinguishable from the liberties conceded by the same Treaty, in the foundation upon which they stand, but they are carefully distinguished in the Treaty of 1783 itself. The undersigned begs to call the attention of the American Minister to the wording of the first and third Articles, to which he has often referred for the foundation of his arguments. In the first Article Great Britain acknowledges an independence already expressly recognized by the Powers of Europe and by herself in her consent to enter nto provisional Articles of November 1782. In the third Article—

the one I read—

Great Britain acknowledges the *right*—

it is printed in italics—

of the United States to take fish on the banks of Newfoundland and other places from which Great Britain has no right to exclude an independent nation.

These banks are I think something like 100 miles from the coast of Newfoundland, but they were to have liberty to cure and dry fish in certain unsettled places; and he then goes on to another branch of the subject.

I find also that the Counsel for the United States in the case of the Halifax Commission 1877 refers to these Treaties, and says:

The Treaties of 1818, 1854 and 1871 related solely to fishing within the three miles. The Treaty of 1783 *recognizes* the right of American fishermen to take on the banks on the high seas, a right which had always belonged to American fishermen, never ceded to them by any Treaty, but which they held by the right of common humanity.

1101 Now, on the same occasion, Mr. Dwight Foster, who was then the Agent of the United States, treats the matter thus. I am reading here from volume II, page 591, of the report of that Fishery Commission.

He says:

Early in the diplomatic history of this case, we find that the Treaty of Paris in 1763 excluded French fishermen three leagues from the coast belonging to Great Britain in the Gulf of St. Lawrence, and fifteen leagues from the island of Cape Breton. We find that the treaty with Spain in the same year contained a relinquishment of all Spanish fishing rights in the neighbourhood of Newfoundland. The Crown of Spain expressly desisted from all pretensions to the right of fishing in the

eighbourhood of Newfoundland. Those are the two treaties of 1763, the Treaty of aris with France and the Treaty with Spain. Obviously, at that time, Great Britain laimed for herself exclusive sovereignty over the whole Gulf of St. Lawrence and ver a large part of the adjacent seas.

I have already pointed out that she claimed that under a Treaty, hether rightly or wrongly:

By the Treaty of Versailles in 1783, substantially the same provisions of exclusion ere made with reference to the French fishermen Now, in that broad claim of risdiction over the adjacent seas, in the right asserted and maintained to have ritish subjects fish there exclusively, the fishermen of New England, as British ubjects, shared. Undoubtedly the pretensions that were yielded to by those Treaties ave long since disappeared. Nobody believes now that Great Britain has any exclu-ve jurisdiction over the Gulf of St. Lawrence or the Banks of Newfoundland, but t the time when the United States asserted their independence and when the Treaty as formed between the United States and Great Britain, such were the claims of Eng-and, and those claims had been acquiesced in by France and by Spain. That explains he reason why it was that the elder Adams said he would rather cut off his right hand han give up the fisheries at the time the Treaty was formed, in 1783, and that xplains the reason why when his son John Quincy Adams was one of the Commis-ioners who negotiated the Treaty of Ghent, at the end of the war of 1812, he insisted o strenuously that nothing should be done to give away the rights of the citizens f the United States in these ocean fisheries.

Now I have a further reference to make to the Committee of Foreign Relations of the United States Senate, coming down a little later. This refers to the Treaty of 1818, and I have already given the reference where that Treaty is to be found. This is the third volume of Wharton's International Law, Section 304. It recites that,

Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed between the High Contracting Parties that the inhabitants of the said United States *shall have forever, in common with the subjects of His Britannic Majesty*, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbors, and creeks, from Mount Joly on the southern coast of Labrador, to and through the straits of Belleisle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company: and that the 1102 American fishermen shall also have liberty for ever to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland, above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the above mentioned limits: provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

This is solely conversant with the question of facilities and advantages in territorial waters, and has no reference to the question of open sea fishing.

Now in reference to that Treaty of 1818, the Committee of Foreign Relations of the United States Senate (a reference which is to be found in the United States Papers, No. 109), says:

Thus it will be seen that the matter to be dealt with was a claim in favour of the inhabitants of the United States to do certain things within the territorial dominion of His Majesty, and not a matter touching the right of the inhabitants of the United

Stated to cruize, fish, or do any other thing in waters that by the public law of nations did not belong to the territorial jurisdiction of His Majesty.

Then follows a discussion as to the meaning of the word "bays". I do not think I need read that. As a matter of fact, for years upon the banks of Newfoundland, and without any question, outside the territorial limit, the fishermen of France, of the United States, of Canada, and of Great Britain are to be found pursuing their calling.

Now I really must ask the Tribunal to allow me to read again this extraordinary statement beginning at page 156 of the United States Argument, in view of what I have now read to you.

It is enough to perceive that it never occurred to the United States Government or its eminent representatives to claim, far less to the British Government to concede, nor to any diplomatist or writer, either in 1783 or 1815, to conceive that these fisheries, extending far beyond and outside of any limit of territorial jurisdiction over the sea that ever was asserted there or elsewhere, were the general property of mankind, or that a participation in them was a part of the liberty of the open sea. If that proposition could have been maintained, the right of the Americans would have been plain and clear.

Now, I have demonstrated, I submit, that the Treaty of 1783 recognized the right in the open sea, and that it granted concurrently with the recognition of that right in the open sea certain rights within territorial waters in British territory. It never was suggested that the former right was affected or touched by the question of the war.

1103 It was not a Treaty right; it was a natural right. It was suggested that the war did put an end to the special privileges that were granted by virtue of the Treaty; but the special privileges in non-territorial waters alone were put an end to by the war.

The PRESIDENT.—Might not there be a difference in respect of time? The historical *exposé* of Mr. Dwight Foster which you have just read seems to me to be practically correct; that Great Britain may have asserted in previous times the doctrine of *mare apertum* in opposition to *mare clausum* which was not quite acknowledged,—they asserted an exclusive right over part of those seas and fisheries which by progress of time and progress of ideas were considered abandoned, though they did not want to abandon it in fact. Towards the end of the eighteenth century it was not abandoned; but, perhaps, at the time of the Treaty of Utrecht it was not quite clear.

Sir CHARLES RUSSELL.—I began by telling you, Sir, there were such claims made by Great Britain, and she professed to base those claims on Treaty rights conceded by France and by Spain. That is so. I did not stop to consider whether she would be justified under those Treaties in making that pretension at all. I have stated what was asserted, what was put forward. There were certain Treaty rights, but that is ancient history.

The PRESIDENT.—The Treaty rights were limited to about 100 miles.

Sir CHARLES RUSSELL.—As I have already pointed out, and you were good enough to assent to my statement I think, even if such powerful nations as France and Spain had conceded to Great Britain rights over an area of the sea, they would not have the power of giving to Great Britain that right as against the people of any other nation in the world on the high seas. Of course, when the United States became an independent Power, one of the family of nations, it would have, in virtue of its sovereignty, the right to claim the free use of the high seas; but the point is this: that, from 1783 down through the whole of this negotiation, Great Britain has never asserted, and the United

States has never alleged that she was asserting, that the right of fishery n the non-territorial waters was not a right that belonged to every ndependent nation. That is the point.

Senator MORGAN.—Do you mean she has abandoned it since 1783?

Sir CHARLES RUSSELL.—I do not know that that would be appropriate language. So far as I have read the history of it, there was no assertion of it: certainly not since 1783.

Senator MORGAN.—There was some mention of it.

Sir CHARLES RUSSELL.—I have read all the documents, and you have seen what mention there is of it. I have read that letter of Lord Bathurst, and I suppose I must read it again. That is going far enough back. Did you mean the United States abandoned it?

Senator MORGAN.—No; Great Britain.

Sir CHARLES RUSSELL.—Then I must read this letter of 1815.

104 First of all, the Treaty of 1783 shows it, as it seems to me; but here is the official statement.

The PRESIDENT.—I think there is no doubt as to that time. What I hint at is that perhaps in former times, say in the seventeenth century towards the middle or end, — perhaps at that time England may have asserted rights over the sea which it did not maintain in the course of the eighteenth century, and certainly not in the course of the nineteenth. It is rather perhaps a progress of theory than of right.

Sir CHARLES RUSSELL.—I recognize an amiable effort to give an explanation of this paragraph, but I beg respectfully to say that this paragraph, is not capable of it, because the paragraph begins with 1783. It is not referring to anything antecedent to 1783. If it had, I should have begun earlier and examined it earlier, but it begins with 1783 and it begins with the erroneous statement that the right of fishing in the open sea was conceded by that Treaty to, or created by that Treaty in, the United States. That is the fallacy. Not only does it begin in 1783, but it absolutely goes on to say that the assertion was further made in 1815, because at the top of page 157, he says "it never occurred to any of these diplomatists in 1783 or 1815 to conceive that these fisheries" and so on, and yet in 1815 Lord Bathurst's letter to the United States Minister (which I must read again) says:

> But the rights acknowleged by the Treaty of 1783 are not only distinguishable from the liberties conceded by the same Treaty and the foundation upon which they stand, but they are chiefly distinguished in the Treaty of 1783 itself. The undersigned begs to call the attention of the American Minister to the wording of the first and third Articles to which he has often referred for the foundation of his argument. In the first article Great Britain acknowleges an independence already expressly recognized by the Powers of Europe and by herself in her consent to enter into provisional articles in November 1782.
>
> In the third article Great Britain acknowledges the *right* of the United States to take fish on the banks of Newfoundland and other places from which Great Britain has no right to exclude an independent nation, but they are to have the *liberty* to cure and dry them at certain unsettled places within his Majesty's territory.

I think, even if that right was asserted at some earlier period, Senator Morgan will see that that is a clear abandonment.

I leave this branch of the subject by expressing my agreement with the opinion stated on page 157 of the United States Argument, that there can not be one international law for the Atlantic, and one for the Pacific, and I agree the law is the same for each—that outside the territorial limits there is an unrestricted right and liberty for all mankind to take what it can from the bosom of the sea.

The next subject that is dealt with as to self-preservation in tim peace is the law of Quarantine, which is referred to on page 159:

"Upon this principle also", he says, "was based the British act putting re tions upon the passage of a vessel on the high sea, approaching Great Britain a port where infectious disease was raging. Quarantine and health regula are usually enforced within the jurisdictional limit, and so confined, are in nary cases sufficient for their purpose. But when in a particular case the 1105 insufficient, and the necessity of protecting the country from incursi dangerous disease requires it, no right of freedom of the sea stands in the of putting proper restrictions on the approach of vessels, at any distance fro shore that may be found requisite.

I need not say that this is a subject as to which there would ready concurrence of all civilized nations to prevent the spread of

The Quarantine analogy.

ease, and any measures that required to be adopte not measures that would be likely to be called in tion by any nation, or as to which it would be necessary to resort t enforcement of any international principle at all. My learned fr has misconceived the effect and character of these laws. The Br statute is the 6th of George the Fourth, chapter 78, passed in which I have before me, and I will furnish my learned friend with he desires. For brevity, I will read a carefully prepared and co summary of that statute. First of all, the Act deals with ve coming to the shores of a particular nation in the same way a Hovering Acts. It deals therefore solely with vessels coming to Br ports. It does not profess to deal in any other way with vessels be the three-mile limit coming from infected places. The following are subject to quarantine:—first, vessels coming to the United dom from infected places; secondly, boats receiving persons and from vessels which have come from or touched at infected places; thirdly, persons or goods on board of such vessels coming fro having touched at infected places, or on board such receiving boa order to meet the case of trans-shipment from infected vessels.

What are the enacting provisions in relation to those classes of sels or goods coming from vessels or boats which have come from inf places? Vessels liable to quarantine, that is, vessels or receiving coming to United Kingdom ports, because, of course, the quaranti to be performed with reference to the port to which it is destine in the port of the territory,—vessels liable to quarantine are to quarantine signals on meeting any other vessel at sea or when the within two leagues of the United Kingdom coast. Signals are continued so long as the meeting vessel continues in sight, or the sel itself remains within two leagues of the coast of the United dom, and until the vessel shall have arrived in a United Kingdom and, if it fails to do that, there is a penalty of £100 fixed for it; that applies to all ships. How is this penalty to be recovered never can touch any vessel that does not come to the port, bec under section 35, the only remedy for the recovery of the penalty proceeding in a local Court against the Captain of the vessel; therefore, although it speaks of the penalty being incurred i quarantine signal is not hoisted when it approaches within two lea it cannot be operative until the ship herself, with the Captain on b of her, has come within the territorial jurisdiction of the port.

Further, vessels having infectious disease on board are req 1106 to hoist a signal when they meet any other vessel at sea o within two leagues of the United Kingdom coast; and the s is to remain hoisted so long as the meeting vessel remains in sigh the vessel itself remains within two leagues of the United King

coast while so in sight or within such distance, until it shall have arrived at the port where it has to perform quarantine. This is the whole of the Statute, I think.

The PRESIDENT.—I suppose that Statute is in application now,—is it still in vigour?

Sir CHARLES RUSSELL.—We have made the enquiry through the Privy Council Office as to whether there was any record of its ever having been put in force against foreign vessels, and this is the answer we got:—Section 8 of the Act enjoined certain formalities on vessels liable to quarantine as soon as they passed within two leagues of the British coast; but the Act provides no machinery for enforcing these Regulations on vessels that do not come within the ordinary limits, or communicate with the shore, and the Privy Council are aware of no instance of any attempt to interfere with any vessel simply passing outside the 3-mile limit, and, in fact, such interference would have been, as far as they understand, both unnecessary and illegal.

Mr. PHELPS.—Is the Act repealed?

Sir CHARLES RUSSELL.—No. It is, therefore, not a Statute which enforces any penalty *in rem* against the ship at all; it is one which simply imposes a penalty against the Captain, which is not enforceable till he comes within the jurisdiction of the Court, and comes with the ship into the port, and which can only be recovered in the local municipal Court.

Of course the performance of quarantine is an operation which must be gone through in the territory of the port. The observation of Lord Chief Justice Cockburn alludes to this in his Judgment in *the Queen* v. *Keyn*, and he treats it, and I think correctly treats it, thus. He says:

> I am further of opinion that Parliament has a perfect right to say to foreign ships that they shall not, without complying with British law, enter into British ports, and that if they do enter they shall be subject to penalties, unless they have previously complied with Requisitions ordained by the British Parliament.

A proposition which is, as I submit, perfectly sound.

Let me just illustrate that. I am quite unable to appreciate what is in my friend's mind about this. Does he suggest that, under this law, we could go outside territorial waters and seize the ship—for instance, a ship that was passing through the British Channel, beyond the three mile limit, on its way to some European port? Does he suggest that we could under this Statute go outside the territorial limits and seize that ship, because she had not hoisted a signal? Such a thing would be impossible. The Statute creates a penalty, a penalty only recoverable against the captain, and only recoverable in a municipal court, when the ship arrives within the territory.

Now I come to the next question, which my friend treats as
1107 important, which covers some space in the printed Argument. I am referring to the last sentence of page 160, where my friend says:

> Upon the same principle has been maintained the right of visitation and search, as against every private vessel on the high seas, by the armed ships of any other nationality. Though this vexatious and injurious claim has been much questioned, it is firmly established in time of war, at least, as against all neutrals. Says Sir William Scott—

And then he proceeds to give a citation. Then he says:

> It has been said that the right of search is confined to a time of war.

Certainly it is, and will still be said, except under Treaty. Then my friend continues:

That assertion proceeds upon the ground that only in time of war can the necessity for it arise. No one has ever claimed that the right should be denied in time of peace, if an equal necessity for it exists. And when such necessity has been regarded as existing, the right has been asserted. Prior to the war of 1812, between the United States and Great Britain, the latter country claimed the right in time of peace to search American ships on the high seas for British subjects serving as seamen. Though the war grew out of this claim, it was not relinquished by Great Britain when a treaty of peace was made. It has been disused, but never abandoned.

Now I stop there for a moment, and I proceed to examine the question. And first I would like to make one general observation upon it. It is quite true that at that time an attempt was made by Great Britain to assert the right to take British seamen from the ships of the United States—perfectly true; and it is perfectly true also that at a later stage it was—I will not say asserted—but assent was sought to be obtained to the right to search vessels—to visit vessels—for the purpose of ascertaining their nationality; that is to say, it was not asserted there was a right to visit a United States or French vessel if it was merely a United States or a French vessel flying French or United States colours, the assertion was limited to the case where there was ground to suspect that the flag of France or the flag of the United States was used dishonestly or fraudulently in order to cover illicit trade in slaves. It is perfectly true that those two assertions were made, and now I proceed to show how they were dealt with, and to enquire whether this statement is correct, which my friend has thought right to put here in his Argument, that: "Though the war grew out of this claim, it was not relinquished by Great Britain when a Treaty of peace was made. It has been disused, but never abandoned". That is the proposition that my learned friend puts forward.

Then he proceeds:

The objection to it on the part of the United States was the obvious one that it was founded upon no just necessity or propriety. Had it been a measure in any reasonable sense necessary to self-defense on the part of Great Britain, its claim would have rested on a very different foundation, and would have been supported by the analogy of all similar cases. The right of search is exercised without question as against private vessels suspected of being engaged in the slave trade.

1108 I beg to say that that is a further inaccuracy, and that I think my friend, if he examines it carefully, will find that that is not correct, and that it is only under Treaty that there is such a right of search.

Then he goes on:

And it is very apparent, that as the increasing exigencies of international intercourse of all kinds render it necessary, the principle that allows it in time of war will be found sufficient to allow it in time of peace.

That is looking into the future. It is not considering what the law is, but suggesting what, at some future time, it may be.

Then he proceeds:

The rule, as has been seen, grows out of necessity alone, and must therefore extend with the necessity.

And thereupon he proceeds to refer to the correspondence of Lord Aberdeen.

I shall now bring this matter (beginning with the correspondence that is there referred to, from 1840 until the last occasion when the subject was referred to, as far as I am aware, in public—in Parliament), down to the year 1858, but I need not do that at any very great length.

Now Lord Aberdeen, who was then Prime Minister, writes to Mr. Everett, who was at that time Secretary of State of the United States, on the 20th December, 1841; and I will ask you, Mr. President, when I read this, to see,—while it is as strenuous a demand on the part of the Foreign Minister for consent on the part of the United States to a course that the Minister of Great Britain is urging as eminently reasonable from his point of view,—whether it amounts to an assertion of it as a *right* at all, or whether it is not rather a demand for the reasonable assent on the part of the United States to what is suggested.

Now this is the language of Lord Aberdeen's letter:

The Undersigned, etc., has the honor of addressing to Mr. Everett, etc., the observations which he feels called upon to make, in answer to the note of Mr. Stevenson, dated on the 21st of October.

As that communication only reached the hands of the Undersigned on the day after the departure of Mr. Stevenson from London, on his return to America, and as there has since been no Minister or Chargé d'Affaires from the United States resident in this country, the Undersigned has looked with some anxiety for the arrival of Mr. Everett, in order that he might be enabled to renew his diplomatic intercourse with an accredited Representative of the Republic. Had the Undersigned entertained no other purpose than to controvert the arguments of Mr. Stevenson, or to fortify his own, in treating of the matter which has formed the subject of their correspondence, he would have experienced little impatience; but as it is his desire to clear up all doubt, and to remove misapprehension, he feels that he cannot too early avail himself of the presence of Mr. Everett at his post, to bring to his knowledge the true state of the question at issue.

The Undersigned agrees with Mr. Stevenson in the importance of arriving at a clear understanding of the matter really in dispute.

This ought to be the first object in the differences of States, as well as of individuals; and, happily, it is often the first step to the reconciliation of the par-
1109 ties. In the present case, this understanding is doubly essential, because a continuance of mistake and error may be productive of the most serious consequences.

Would you, Mr. President, kindly allow my friend Sir Richard Webster, to read this next passage for me.

Sir RICHARD WEBSTER.—He goes on:

The Undersigned again renounces, as he has already done, in the most explicit terms, any right on the part of the British Government to search American vessels in time of peace. The right of search, except when specially conceded by Treaty, is a purely belligerent right, and can have no existence on the high seas during peace.

The Undersigned apprehends, however, that the right of search is not confined to the verification of the nationality of the vessel, but also extends to the object of the voyage, and the nature of the cargo. The sole purpose of the British cruizers is to ascertain whether the vessels they meet with are really American or not. The right asserted has, in truth, no resemblance to the right of search, either in principle or in practice. It is simply a right to satisfy the party who has a legitimate interest in knowing the truth, that the vessel actually is what her colours announce. This right we concede as freely as we exercise. The British cruizers are not instructed to detain American vessels under any circumstances whatever; on the contrary, they are ordered to abstain from all interference with them, be they slavers or otherwise. But where reasonable suspicion exists that the American flag has been abused, for the purpose of covering the vessel of another nation, it would appear scarcely credible, had it not been made manifest by the repeated protestations of their Representative that the Government of the United States, which have stigmatized and abolished the trade itself, should object to the adoption of such means as are indispensably necessary for ascertaining the truth.

Then lower down on the same page he says:

The Undersigned has also expressed his belief that the practice was general, of ascertaining by visit, the real character of every vessel on the high seas, against which there should exist reasonable ground of suspicion. Mr. Stevenson denies this; and he asks, what other nation than Great Britain had ever asserted or attempted to exercise, such a right? In answer to this question, the Undersigned can at once refer to the avowed and constant practice of the United States, whose cruizers, especially in the Gulf of Mexico, by the admission of their public journals, are notoriously in the habit of examining all suspicious vessels, whether sailing under the English flag, or any other.

Sir CHARLES RUSSELL.—Then he says at page 618:

It is undoubtedly true, that this right may be abused, like every other which is delegated to many and different hands. It is possible that it may be exercised wantonly and vexatiously; and should this be the case, it would not only call for remonstrance, but would justify resentment. This, however, is in the highest degree improbable; and if, in spite of the utmost caution, an error should be committed, and any American vessel should suffer loss or injury, it would be followed by prompt and ample reparation. The Undersigned begs to repeat, that with American vessels, whatever be their destination, British cruizers have no pretension in any manner to interfere. Such vessels must be permitted, if engaged in it, to enjoy a monopoly of this unhallowed Trade; but the British Government will never endure that the fraudulent use of the American flag shall extend the iniquity to other nations by whom it is abhorred, and who have entered into solemn Treaties with this country for its entire suppression.

1110 I will now read the last paragraph of the letter:

Mr. Stevenson has said that he had no wish to exempt the fraudulent use of the American flag from detention; and this being the case the Undersigned is unwilling to believe that a government like that of the United States, professing the same object and animated by the same motives as Great Britain should seriously oppose themselves to every possible mode by which their own desire could be really accomplished.

I think I am justified, Mr. President, in saying that although the word "right" is used there, it is used in a sense in which even by writers upon law it is sometimes used; he uses it to indicate something claimed which ought to be allowed, ought to be assented to, by the other Power. He points out that it is not the right of search that he is insisting on, but the right to use means to ascertain whether or not a vessel is fraudulently flying a false flag. This right was resisted by the United States it was resisted, too, by France. That he was speaking of the right in that vaguer or lesser sense of the term, and not of something which he could do under the force of some existing law, is made apparent by the fact that he states that if, the circumstances being sufficiently suspicious to justify visitation, it turns out upon visitation that that suspicion is not warranted, then reparation is to be made to the vessel so visited; whereas, of course, if it were an absolute right, enforceable against the will of particular nations, you would not find it accompanied by such a provision for reparation.

The matter came up again in 1858; and it came up in a way that, if anything can be made interesting in this matter, will make it more or less interesting to the Tribunal. It came up in the House of Lords on the 26th of July 1858, and some very eminent jurists took part in the discussion; and Lord Lyndhurst, whose position is known, I should think, to all members of the Tribunal—at one time Chief Baron of the Exchequer, afterwards Lord Chancellor, and besides, an important political personage—rises to put a question, of which he had given notice to the Secretary of State for Foreign Affairs. America, I think, has the right to claim him as one amongst many of her distinguished sons. Lord Malmesbury was the Foreign Secretary. Lord Lyndhurst said:

Your Lordships, no doubt, have most of you read a speech which was made by Mr. Dallas, the American Minister, a short time since, at a meeting of his fellow-subjects, to celebrate the anniversary of American Independence. On that occasion the honourable gentleman stated that the question of the right of visiting American vessels in time of peace on the high seas had been finally settled. This is a subject, my Lords, of so much importance and such deep interest that it is material that we should receive a distinct and precise account of the terms on which that settlement is based; and I have therefore given notice of a question which I intend to propose to my noble the Secretary of State Foreign Affairs, in order that he may give us some explanation on the subject to which I have referred. Many persons—perhaps I

r "many persons", but several persons, and those in a high political r to think that that proceeding was not justified, and that in point 'e have surrendered a most valuable and important right. The hich I make to that is, that we have surrendered no right, for that, f fact, no right such as that which is contended for has ever existed. ɔrds, abandoned the assumption of a right, and in doing so we have, astly, prudently and wisely. Now, my Lords, with your permission, to make a few observations upon the general question, and to refer most eminent authorities on the subject; but I assure you that I troubled you were it not that I think it is of great importance that hould be distinctly and finally understood and settled. The first ch I state is this: That in no writer on international law has that asserted; and, in the next place, that there is no decision of any e having jurisdiction to decide such questions in which that right tted. I wish, in making this assertion, to fortify myself by some l I cannot quote a higher or a better English authority than that of ho states distinctly, in the words which I am about to read—in conıat I have stated—that no such right has ever been asserted by any ority. His words are these:

ɔ authority that gives the right of interruption to the navigation of npon the high seas excepting that which the rights of war give to ts against neutrals."

am dealing with the assertion that this was a right claimed d, or claimed to be exercised, by Great Britain, and not But of course the Tribunal will see that this is a valuable ich I need not have to go back upon again, upon what the

inct statement made by that noble and learned Lord. In addition, refer to Wheaton, the eminent American authority on International the proposition in these terms:

ible to show a single passage in any institutional writer on public gment of any Court by which that law is administered, which will ɔise of such a right on the high seas in time of peace independent of ."

Lordships perceive that both on this side of the water and in Amerauthorities and by the highest jurists, that right, in the passages to ferred, is controverted instead of being admitted. It has been agiween this country on the one side and America on the other. The n the other side of the water makes his statement and assertion; our authority an this side of the water makes his assertion; and those tly and distinctly agree. For myself, my Lords, I have never been r any principle of law or reason on which that right could be suprefer again to the same high English authority—Lord Stowell—upon d you shall hear what he emphatically states with respect to it. hed jurist says:

n exercise the right of visitation and search on the high seas except on claim. No such right has ever been claimed, nor can it be exercised, pression of interrupting and harassing the real and lawful navigaountries, for the right, when it exists at all, is universal, and will untries. If I were to press the consideration further, it would be by ntic mischiefs which such a claim is likely to produce."

at another very high authority—the American Judge Story—in the e of the "Marianna Flora", expressed the same opinion in almost the l in language as emphatic. So here again is a coincidence of author- two parties agitating the question—the authority on this side of sponding exactly with the authority on the other. But I do not ecessary to refer to any cases in support of the cases I am consider- ll refer only to the principle on which the question rests. What is with respect to the high seas and the navigation of the high seas? equal on the high seas. Whether they be strong and powerful, or cile, all are on a footing of perfect equality. What is the position of ip on the high seas? A ship is part of the dominion to which she hat right has the ship of one nation to interfere with the ship of any here the rights of both parties are equal? The principle is so clear that it will not admit of the smallest doubt. I am unwilling on a kind to refer to any arguments of my own, or to any authority which the subject; but hear what is said by Lord Stowell with respect to of the high seas. His language is this:

"All nations being equal, all have an equal right to the uninterrupted use of t unappropriated parts of the ocean for their navigation. In places where no lo authority exists, where the subjects of all States meet on a footing of entire equali and independence, no one State or any of its subjects has a right to assume or ex cise authority over the subjects of another."

That is a confirmation of the doctrine which I have stated, that the principle which this question is to be decided, is the equality of all nations on the high se Admitting this principle, how can it be asserted that the ships of one nation c interfere in any way with the vessels of another? Then, having laid down t principle, the consideration next occurs that difficulties may arise out of fra which may be practised on the high seas; and it is said that the flag of America m be assumed by another Power to cover the basest of purposes. But how can the of a third Power, or of the subjects of a third Power, by possibility affect any ri existing on the part of the United States? Take this case: By our Treaty w Spain, we have a right to visit and search Spanish vessels with a view to prevent Slave Trade. But, how can that agreement between us and Spain, by any possi ity, affect the rights of America? Clearly in no way at all. But, then, what our cruizers to do?

He refers a little later to a discussion that took place after the Trea of Vienna in 1815. I read a little further down in the same spee He says:

Treaties have been entered into between England and foreign countries, giv the right of visit. But why enter into such treaties, if the right of visiting i national right, founded on international law? What took place in the year 1815 af the Treaty of Vienna? Lord Castlereagh applied to the French Government to est lish some mutual system by which cruizers could visit the vessels of either count but the Duc de Richelieu replied that France would never consent to a mariti police being established over her own subjects, except by persons belonging to own country. I think I have now gone far enough to establish the position w which I started, etc.

Then Lord Malmesbury, in reply, indorses categorically and distinc the opinion of Lord Lyndhurst.

The Tribunal here adjourned for a short time.

The PRESIDENT.—Sir Charles, we are ready to hear you.

Sir CHARLES RUSSELL.—I was about to read the reply of Lo Malmesbury, who was then the Foreign Secretary. I will only re the part which shows his agreement with the statement of the law made by Lord Lyndhurst. He says:

It is with great pleasure that we have heard the views of my noble
1113 learned friend on this important subject, because they conform precisely the opinion of the Law Officers, of the Crown, whom we thought it our d to consult—

Lord Hannen may recall that the law officers of the Crown at th time were Sir Fitzroy Kelly, and Sir Hugh Cairns. Lord Malmesbu says:

because they conform precisely to the opinion of the Law Officers of the Cro whom we thought it our duty to consult before we sent answer to the communi tions we received from the American Government.

I may say of the then Attorney General, Sir Fitzroy Kelly, that was afterwards Chief Baron of the Court of Exchequer, and Sir Hu Cairns, afterwards Lord Cairns, was first of all a Lord Justice Appeal, and afterwards Lord Chancellor, and a lawyer of Great em nence.

Then Lord Malmesbury proceeds:

When we received General Cass's communication—

Which I shall presently read to you as showing the views of t United States upon the question of law.

When we received General Cass's communication, which was addressed to H Majesty's Government, we immediately consulted the Law Officers of the Crow

and they unanimously asserted that the international law in relation to this question was precisely as it has been just described by my noble and learned friend. Upon that opinion Her Majesty's Government at once acted, and we frankly confessed that we have no legal claim to the right of visit and of search which has hitherto been assumed. Her Majesty's Government therefore abandoned both those claims, but at the same time they placed before the American Government the paramount necessity of agreeing upon the adoption of some instructions perfectly identical in character to be placed in the hands of the officers of both Governments, and, indeed, in the hands of the officers of all maritime nations, by which all Powers should be ruled, so as for the future to avoid all obstruction to commerce, while at the same time the fraudulent use of national flags may be prevented.

Lord Aberdeen joined in this discussion, and you will recollect that it was Lord Aberdeen, when Minister for Foreign Affairs, who conducted the correspondence in 1841, to which I referred in this connection a few minutes ago. Lord Aberdeen says:

I was therefore astonished to hear my noble and learned friend (Lord Lyndhurst) quote the statement of the highly respected American Minister—

that is Mr. Dallas—

who is now in this country, to the effect that we had given up frankly and finally the right of visit and search.

Twenty years ago—

Referring back to the period I have mentioned—

Twenty years ago the Government of that day repudiated the assertion of any such right, and therefore what the noble Earl the Secretary of State for Foreign Affairs can have given up I am at a loss to understand. Any such right was given
1114 up then as frankly and finally as it possibly can be given up at this moment.

After my noble and learned friend's quoting the high authority of Lord Stowell, it may appear ludicrous in me to quote myself. At the same time, in order to show how the matter stood twenty years ago, I will just quote a note of my own. Though an humble authority, still I was speaking the language of the British Government, and that language was received by the American Government with acquiescence and satisfaction.

Then he gives the passage from his letter which I have read to you already. I will merely read enough of it to remind you what it was. Its words are these:

The Undersigned resigns all pretensions on the part of the British Government to visit and search American vessels in time of peace; nor is it as American vessels that such vessels are ever visited. But it has been—

and so on.

He then proceeds to repeat at length the letter which I have already read.

Now it will be convenient, I think, if I deal at once with the correspondence which led to this discussion in Parliament; and I invoke that correspondence, not merely because it shows that there was not the assertion as a matter of right at that time, or that if there was at any time such an assertion, it was definitely abandoned. In view of what I have so far read, and still more in view of what I am about to read, I will content myself with expressing my surprise that my learned friend, Mr. Phelps, having, as I cannot but think he had, all this matter under his eye, or at least having the opportunity considering it thoroughly, should have written, as he has written in his Argument, at page 161: "It has been disused but never abandoned".

The correspondence is correspondence presented to Parliament in 1859, and I read from the Parliamentary papers. I will begin by an important despatch from General Cass to Lord Napier.

General Cass, I believe, was at that time Secretary of State.

Mr. Justice HARLAN.—In what year?

Sir CHARLES RUSSELL.—1859.

Mr. Justice HARLAN.—He was.

Sir CHARLES RUSSELL.—It is rather long, but it is important, not merely for its value as an expression of the views of the United States Government, but for the authority which it cites upon the general question of the right of search. On page 5 of this correspondence, he cites an opinion of Lord Stowell in the decision of a case of a French vessel seized upon the coast of Africa: "No nation can exercise a right of visitation and search upon the common and unappropriated parts of the ocean except upon the belligerent claim". That is, of course, the contention that I have for so long been maintaining, that this right of search is a belligerent right and does not exist in time of peace. He then proceeds:

1115 No nation has the right to force its way to the liberation of Africa by trampling on the independence of other States, on the pretence of an eminent good, by means that are unlawful, or to press forward to a great principle by breaking through other great principles which stand in the way.

Then on page 6 is this emphatic statement:

The United States deny the right of the cruisers of any other power whatever for any purpose whatever to enter their vessels by force in time of peace. No such right is recognized by the law of nations. As Lord Stowell truly said: "I can find no authority that gives the right of interruption to the navigation of States upon the high seas, except that which the right of war gives to belligerents against neutrals. No nation can exercise a right of visitation and search upon the common and unappropriated parts of the Ocean except upon the belligerent claim".

At page 7 he says something which may have a very distinct application to this case:

It is one thing to do a deed avowedly illegal, and excuse it by the attendant circumstances: and it is another and quite a different thing to claim a right of action, and the right also of determining when, and how, and to what extent, it shall be exercised. And this is no barren distinction so far as the interest of this country is involved, but it is closely connected with an object dear to American people—the freedom of their citizens upon the great highway of the world.

So much for General Cass's view. Communications were then opened with other European Powers, with France and Germany among others, and proposals made for the concession of mutual rights by convention, which some of those Powers agreed to in 1862. On page 38 of this Parliamentary paper the suggestion is made, which I think emanated in the first instance from Lord Malmesbury, as a basis of such a Convention.

In virtue of the principle of the immunity of national flags, every merchant vessel navigating the high seas is exempt from all foreign jurisdiction. A ship of war can therefore only visit, detain, arrest and seize those merchant-vessels which she recognizes as being of the same nationality as herself.

Then he proceeds:

The flag being *primâ facie* the distinctive sign of the nationality of a vessel, and consequently the proof of the jurisdiction to which she is subject, it is natural that a merchant vessel on finding herself on the high seas in the presence of a man-of-war should hoist her flag to attest her nationality: so soon as the man-of-war has made herself known by hoisting her colours, the merchant vessel ought likewise to hoist hers. If she refuses to hoist her flag it is agreed that she may be summoned to do so, first, by a blank gun, and if that remains without effect, by a second gun shotted, but pointed so as not to strike her. As soon as the merchant vessel by hoisting her flag has established her nationality, the foreign man-of-war can claim no authority over her. The utmost which the latter may do is, in certain cases, to claim the right of speaking with her; that is to say, to ask her to reply to questions addressed to her through a speaking trumpet, but without interfering with her course. When, however, the presumption of nationality resulting from the colours hoisted by a merchant vessel is rendered seriously doubtful by information or by signs of a nature to encourage the belief that the vessel does not belong to the nation whose colours

s assumed, then the foreign man-of-war may have recourse to a verification of the nationality assumed. With this object a boat shall be sent to the suspected vessel which shall have been previously hailed to announce the intended visit. The verification shall consist of the examination of the papers proving the ality of the vessel.

ese were the proposals which resulted in the Treaty of 1862 upon ubject.

d HANNEN.—From whom did these proposals emanate?

CHARLES RUSSELL.—Originally from Lord Malmesbury, I think. s a communication by Lord Malmesbury, the Foreign secretary, rd Napier the British Minister at Washington. This was Lord esbury's proposal as to the identical instructions to be given to ruisers of these nations.

says:

exhibition of these documents is all that can be desired. All enquiry into the of the cargo, commercial operations, or, in a word, on any other point but that ionality, all search or visit of any kind, are absolutely forbidden. The officer ted with the verification ought to conduct his proceedings with great discre- nd with all courtesy, and leave the vessel as soon as the verification has been d, offering to enter in the ship's papers the fact and circumstances of the ation, and the motives which determined him to resort to it.

ept in the case of legitimate suspicion of fraud, it ought never otherwise to be ary for the commander of a man-of-war to go or to send on board a merchant-, so numerous are the signs which, putting colours out of the question, reveal eye of a seaman the nationality of a vessel.

en follows this important provision:

very case it is clearly understood that the man-of-war that decides on board- foreign merchant-vessel does it at her own risk and peril, and remains respon- for all the consequences which may be the result of her act.

commander of the foreign ship of war who shall have had recourse to this re ought, in all cases, to make it the subject of a report to his Government, ould explain the reasons of his having so acted. This report, and the reasons led to the verification, shall be communicated officially to the Government to the vessel whose colours have been verified shall belong.

enever the examination shall not be justified by evident reasons, or shall not een conducted in a suitable manner, a claim may arise for indemnity.

ere then is a communication of a similar kind to the Government ance; and on page 59 there is a communication to Lord Malmes- by the Duke of Malakoff; and annexed was a draft of instructions sed to be issued to the Commanders of French ships of war, which though I have not compared them word for word), practically ical with what I have read. I will read sufficient to justify that ment. They begin:

UCTIONS PROPOSED TO BE ISSUED TO COMMANDERS OF FRENCH SHIPS OF WAR.

onsequence of the lapse of the Treaty with Great Britain for the suppression Slave Trade, the French and British Governments have felt the necessity of g to some provisional arrangement with respect to the visit of merchant-vessels cted of fraudulently assuming the British flag.

The counterpart of that was "suspected of assuming fraudulently the French flag", and it begins:

tected by the independence of her national flag, a merchant-vessel navigating igh seas is subject to no foreign jurisdiction, unless by virtue of any Treaty. n-of-war can therefore only visit, detain, arrest, and seize those merchant-ves- which she recognises as being of the same nationality as herself.

nd it proceeds to point in the same way to the flag being a *primâ* indication, if there is no ground to suspect its honesty, of the onality of the vessel.

Then it proceeds to say that, if it can be seriously called in question that it is fraudulently assumed, the proceedings mentioned may be taken; and finally, in clause 10:

In every supposition

that means in every supposed case,

it is thoroughly understood that the captain of a man-of-war who decides upon boarding or sending on board a merchant-vessel, always does it at his own risk and peril, and remains responsible for all the consequences of his act.

If the captain is mistaken, if he finds that the vessel is honestly bearing the flag to which she is entitled, then the nation to which the cruiser belongs must pay if the vessel has been damnified.

The PRESIDENT.—Is not that French draft applicable to time of war?

Sir CHARLES RUSSELL.—I do not understand it to be so. I understood this was intended to be applicable in time of peace also, that it should be mutually agreed by treaty to allow this invasion of what would have been, without such agreement, the invasion of the territoriality of the country. The object was one which all Governments would apparently have a *primâ facie* interest in effecting, namely, the prevention of the fraudulent use of the national flag.

The PRESIDENT.—Were there any negotiations between France and England at that time about that matter.

Sir CHARLES RUSSELL.—Certainly, what I have just read to you was the communication from the Duke of Malakoff to Lord Malmesbury.

The PRESIDENT.—As it is dated in 1859, I thought it was a provision with reference to the Italian war against Austria.

Sir CHARLES RUSSELL.—I do not see any trace of it. The real object of the whole of this matter was the desire of those nations that were really in earnest to suppress the slave trade, that flags of nations that were themselves parties to the suppression should not be fraudulently used, or that flags of other nations should not be fraudulently used to cover that obnoxious traffic. I did read it, but probably I did not read distinctly. It is headed "Instructions proposed to be issued to commanders of French ships of war."

1118 The PRESIDENT.—Yes, but it does not apply in time of peace. It does not imply that it is connected with the slave trade negotiations. That is what I did not know.

Sir CHARLES RUSSELL.—If I may suggest, the first clause rather shows it must have been contemplating a time of peace and not a time of war:

In consequence of the lapse of Treaty of Great Britain for the suppression of the slave trade the French and British Governments have felt the necessity of coming to some provisional arrangement with respect to the visit of merchant-vessels suspected of fraudulently assuming the British flag.

The PRESIDENT.—Yes, I beg your pardon, I had lost sight of it: you did read it and I remember it now.

Sir CHARLES RUSSELL.—Then, on page 64, are to be found similar instructions "about to be issued" (they had then got to the point of agreement) "to the Commanders of Cruisers". I need not trouble by reading that; I think it follows on the same lines.

There is only one other reference I have to make. The United States come into this arrangement; and I will read General Cass's communication on the subject. It is the 12th of May, 1859, to Lord Lyons, who was then Minister at Washington. A similar draft had been sent for the consideration of the United States Government:

As stated in the draft furnished by Lord Napier, no merchant-vessel navigating *the high seas* is subject to any foreign jurisdiction. A vessel of war cannot, there-

visit, detain, arrest, or seize (except under Treaty) any merchant-vessel not gnised as belonging to her own nation. And as a necessary consequence from rule, it is added in the same draft that in every case it is clearly to be under- l that the vessel of war which determines to board a merchant-vessel must do her own risk and peril, and must remain responsible for all the consequences h may result from her own act.

hen General Cass proceeds:

ese extracts, which fix the responsibility of every Government whose officers rupt the voyage of a merchant-vessel upon the ocean, suggest very strongly the tion by each Government of such instructions to its own officers, as will tend to : them appreciate this responsibility, and lead them to observe great caution in g upon their suspicions against such a vessel. The same extracts supply a very limitation, also in respect to the cases to which the instructions can, under any mstances, apply.

nd then follows this passage, to which I would ask attention.

aving out of view,

i General Cass

rime of piracy, which happily is now seldom committed, the only instance pt under Treaty) in which a ship of war may be excused in visiting, detaining, ting, or seizing any merchant-vessel bearing a foreign flag, is when such vessel r good and sufficient reasons, believed to belong, in fact, to the country of the ing ship,—

r own nationals' ship.

A slaver cannot be detained by a foreign vessel because it is a slaver, unless the right of detention in such a case has been conferred by the Government to which the foreign vessel belongs. Except so far as it may have parted with Treaty, every nation has the exclusive care of its own flag upon the high seas.

he final letter is also a letter from General Cass of the 25th of Janu- 1859, in which he, referring to the African Slave Trade, says, and e justly says:

e United States were among the earliest of the nations of the world to denounce Traffic as unjust and inhuman.

nd then he proceeds:

hile, however, the President is thus earnestly opposed to the African Slave le, and thus determined to give full effect to the laws of the United States for ppression, he cannot permit himself, in so doing, to concur in any principle, or it to any practice, which he believes would be inconsistent with that entire unity of merchant-vessels upon the ocean, in time of peace, for which this Gov- ent has always contended, and in whose preservation the commerce of the d has so deep an interest.

is is also the position, I am gratified to observe, of the Government of France. ce, like the United States, recognises no right of search or visit upon the high except in time of war. France, like the United States, holds, in the language our Memorandum, that an "armed vessel cannot visit, detain, arrest, or sieze any uch merchant-vessels as it ascertains to belong to the same nation to which the d vessel itself belongs." France, like the United States, holds further, that e cases may exist of a fraudulent assumption of a flag, the verification of such se must be made at the peril of the party making it, or in the words of your orandum, "under all circumstances it is well understood that the armed vessel may determine to board a foreign merchant-vessel, does so in every instance at wn risk and peril, and stands responsible for all the consequences which may w the act."

hile thus recognizing the immunity of merchant-vessels on the ocean, and the e responsibility which is assumed by a ship of war when she boards a foreign in order to verify its flag, your Memorandum suggests some interesting views spect to the caution with which such a verification should be pursued, and such ponsibility exercised.

lo not understand that the French Government desires to limit this responsi- y, or to change in any way that rule of international law by which in time of e an honest merchantman is protected on the ocean, from any visit, detention, arch whatever.

Now I have come to the end of that correspondence, and I will n more pointedly refer to the inaccuracies, as I submit I have now shov them to be, of the United States Argument than to say this, that th correspondence clearly shows that whatever assertion was made in t first instance was not an assertion of a general right of visitation a search, but was a right put forward as a right undoubted, I admit, Lord Palmerston, who used that language, of visitation for the purpo of establishing the nationality of the ship: that from the assertion that right, in the emphatic language which I read earlier, he retire and that that view is expressly disclaimed by the responsible minis of the Crown in his place in Parliament, acting upon the opinion of t Law Officers of the day, and reiterated and communicated in the c respondence which I have just read.

1120 Lord HANNEN.—What did those proposals result in?

Sir CHARLES RUSSELL.—In a Treaty of 1862. I thought I h it here to refer to it, but I have not, my Lord.

Lord HANNEN.—I only wanted a general statement to what exte they were adopted.

Sir CHARLES RUSSELL.—Shortly put it is this: a Treaty was ente into between the United States and Great Britain, by which was mu ally conceded to the ships of war of each Power the right under general conditions I have read to search vessels bearing the flag of other, in order to ascertain if it were the true flag. The Treaty, confined in its operation to the waters in which the West African sla trade would have been carried on.

General FOSTER.—In 1862?

Sir CHARLES RUSSELL.—I think so.

The PRESIDENT.—And I think in the Treaty between France a England that not even so much as that was conceded.

Sir CHARLES RUSSELL.—No, not till a later period. France always been very staunch in denying any right of interference with ships upon the high seas, even under these extreme circumstances they were considered. She always strenuously denied the right in a form, and even as a matter of agreement she was very slow and ch in altering the position she assumed.

I now pass on to another matter. You will see at the end of pa 162 of the Argument an innocent little passage, as it looks there, tak from Azuni, which, if I did not explain the context, might lead t very wrong conclusion indeed as to its meaning.

> Azuni carries the principle still further, and holds that even national rights sho yield to the rights of another nation, when the consequences to the latter are more important.

A very broad proposition indeed.

> When the perfect right of one nation clashes with the perfect right of anoth reason, justice, and humanity require that in such case the one that will experie the least damage should yield to the other.

Well, if it has any application to this case that would mean that is more important to the United States to keep to the industry of ki ing seals on the Pribilof Islands than it can be to Canadian fisherm to pursue pelagic sealing on the high seas, and therefore pelagic se ers should on that ground give way.

But I cannot think that my learned friend Mr. Phelps had leisure read the context, or he would not have cited this passage, becau when the context is read, his citation is, to say the least, amusing. learned friend, Mr. Box, has been good enough to summarize the who

ısage for me, and, I think, correctly. I have Azuni here, and I will hand it to my learned friend. It is Azuni, vol. 1, page 226.

:1 This is the *résumé* of the full passage and context, and my learned friends will see the point he makes—the illustration he es of the clashing of those rights.

Marquis VENOSTA.—Azuni was an Italian.

Sir CHARLES RUSSELL.—Yes he was an Italian writer on the "Droit ritime de l'Europe".

Mr. PHELPS.—I cited from the English translation, this is the French.

Sir RICHARD WEBSTER.—That may be so, but still his words are re.

Mr. PHELPS.—Yes.

Sir CHARLES RUSSELL.—My criticism is not one that turns upon bal translation. The translation that my learned friend has used is te accurate so far as the translation goes, but it is the context I want call attention to to show what the particular passage means.

t is in nature a sacred and inviolable law which, in the conflict of) equal rights, authorises the suspension of the one of which the erruption produces a less damage, reparable in some manner either re easily or with less expense.

These are the instances, and the Tribunal will at once see that this ny only point about it.

The instances given are:

Jettison: that is to say, a ship is in peril, the whole adventure is in ril, and the right of the owner of particular goods, which happen to be the top of the cargo and under the hatch way, must give way if the tison of that cargo is necessary for the preservation of the greater rtion of the whole adventure, or of the lives of those on board.

Demolition of a house to prevent a fire from spreading to one's own: ke the case which frequently happens in the great prairies of America ıere it is I believe thought perfectly justifiable if a fire is raging, to t down the intervening vegetation, which belongs to somebody else, prevent that fire spreading and causing more widely spread devasta- n.

So, sinking a burning ship to prevent the fire from spreading to its ighbours.

Taking one's neighbour's timber to raise the bank of a stream which on the point of overflowing.

In extreme scarcity, taking ship-loads of food to supply the nation ich is in want. That is of course a very extreme case.

In all these cases says Azuni it is enough to repair the damages in ler to prevent complaint.

This violation of right is commanded by the imperious law of neces- y which, in this conflict, chooses that one avoid the imminent, irre- rable, and greater evil, of the death or ruin of a great number of lividuals, equivalent compensation being granted.

I think that will show that the particular passage is not of any value on the subject we are discussing.

I pass on now to one of a series of illustrations given by my learned end, which, of course, he would not have given if he had not satis- fied his own mind that they were in some sense analogies. But

22 analogies are like metaphors. They are very difficult to man- age; and indeed an analogy brings you but a very short way, d that not very satisfactory either, upon your journey, because you ve first to establish that the analogy is really a perfect analogy, and hen you have got to that point it becomes a question *idem per idem*,

so that you are remitted back to the original case, which was your crux and difficulty in the matter.

But I must notice these cases. The first is on the top of page 176 of the argument:

Suppose that some method of explosive destruction should be discovered by which vessels on the seas adjacent to the Newfoundland coast outside of the jurisdictional line could, with profit to themselves, destroy all the fish that resort to those coasts, and so put an end to the whole fishing industry upon which their inhabitants so largely depend. Would this be a business that would be held justifiable as a part of the freedom of the sea? Although the fish are admitted to be purely *feræ naturæ*, and the general right of fishing in the open seas outside of certain limits is not denied.

Well, I would first ask: Is there any analogy between that case and the case we are discussing, if that can be called the exercise of the right of fishing at all? As I read the case, I fail to see where the profit comes in, because he says: "Could, with profit to themselves, destroy all the fish".

Mr. PHELPS.—Yes.

Sir CHARLES RUSSELL.—And gather them—perhaps that is understood?

Mr. PHELPS.—Certainly.

Sir CHARLES RUSSELL.—"Destroy all the fish and gather them". I have, in the first instance, to say that it is a little extravagant to compare that which is not a known or recognized form of fishing with the pursuit of seals pelagically, which is the oldest form of the pursuit of seals known in the history of the pursuit itself.

Next, I say—(I think Senator Morgan was good enough to put a question to me the other day on the subject)—if in truth the case were that such wholesale destruction were resorted to for disproportionate results, it would be very strong evidence indeed to go to any Tribunal to determine whether that act was not itself done maliciously, and with the intent to injure those who had the common right of fishing.

Now the next case that is put is this:

An Atlantic cable has been laid between America and Great Britain, the operation of which is important to those countries and to the world. Suppose some method of deep-sea fishing or marine exploration should be invented, profitable to those engaged in it, but which should interrupt the operation of the cable and perhaps endanger its existence. Would those nations be powerless to defend themselves against such consequences, because the act is perpetrated upon the high sea?

Well, one would require to know the circumstances intended to be contemplated by that paragraph. For instance: Was the injury to the cable done accidentally in the lawful pursuit of a known mode
1123 of fishing, because, if so done, I should say there was no remedy, and no cause of complaint. If it were done gratuitously and maliciously, I should have thought there was. I am not now troubling myself with the question of jurisdiction or the particular Court in which the cause of action might be tried—I am speaking of it on broad and general principles, assuming no question of venue, or of technical difficulty, to arise. But in truth all this matter (because of the uncertainty of what the rights would be juridically considered in relation to such a matter) has been already dealt with, with the co-operative assent of, I may say, all the civilized Powers in the World. I proceed to shew how it has been dealt with.

By the Treaty of the 14th March 1884,—I will mention presently what nations are parties to it—wilful and negligent interruptions of telegraphic communication are made punishable without prejudice to civil action (Art. 2); offenders are to be tried in the Courts of the country of their own ship or nation (Art. 8); and when there is reason to

believe that a ship has infringed the Treaty, the cruisers of the contracting Parties may require production from the master of "pièces officielles" proving its nationality (Art. 10).

Now I have the Treaty before me. The Powers who are parties to it are.—The Queen of the United Kingdom of Great Britain and Ireland; the Emperor of Germany; the King of Prussia; the President of the Argentine Confederation; the Emperor of Austria; the King of Bohemia; the King of the Belgians; the Emperor of Brazil; the President of the Republic of Costa Rica; the King of Denmark; the President of the Dominican Republic; the King of Spain; the President of the United States of America; the President of the States of Columbia; the President of the French Republic; the President of the Republic of Guatemala; the King of the Hellènes; the King of Italy; the King of the Ottomans; the King of the Netherlands; The Grand-Duke of Luxembourg; the Shah of Persia; the King of Portugal; the King of Roumania; the Emperor of all the Russias; the President of the Republic of Salvador; the King of Servia; the King of Sweden and Norway; the President of the Oriental Republic of Uruguay. I cannot suggest any great Power that is not a party to this Convention, and therefore the case which my friend here suggests as a difficulty is a case which these Powers have recognized as one which might not be perhaps adequately or properly dealt with under existing international law, and therefore they have made it a matter of express compact for the benefit of all the Nations.

Now the next case on page 176, to which my friend refers, is one highly creditable to my friend's ingenuity, but does it help the Tribunal? My friend says:

> If a light-house were erected by a nation in waters outside of the three-mile line, for the benefit of its own commerce and that of the world,

that is the first "if"

> 1124 if some pursuit for gain on the adjacent high sea should be discovered which would obscure the light or endanger the light-house or the lives of its inmates, would that Government be defenseless?

Well, it is a very difficult case to realize what is really meant by that. For instance, I cannot quite realize how a pursuit of fishing on the high seas could, except by some stretch of imagination of which I am not capable, require the obscurity of the light of a light-house, or endanger the light-house or the lives of its inmates; but I wish to point out that I think my friend has, for the moment forgotten, that if a light-house is built upon a rock or upon piles driven into the bed of the sea, it becomes, as far as that light-house is concerned, part of the territory of the nation which has erected it, and, as part of the territory of the nation which has erected it, it has, incident to it, all the rights that belong to the protection of territory—no more and no less.

Mr. PHELPS.—If it should be five miles out?

Sir CHARLES RUSSELL.—Certainly, undoubtedly. The most important light-houses in the world are outside the 3 mile limit.

Lord HANNEN.—The great Eddystone Light-house, 14 miles off the land, is built on the bed of a rock.

Sir CHARLES RUSSELL.—That point has never been doubted; and if it were there is ample authority to support it. The right to acquire by the construction of a light-house on a rock in mid-ocean a territorial right in respect of the space so occupied is undoubted; and therefore I answer my friend's case by saying that ordinary territorial law would apply to it—there is no reason why any different territorial law should apply.

Then my friend proceeds:

Lord Chief Justice Cockburn answers this inquiry in the case of *Queen* v. *Keyn* above cited (p. 198) when he declares that such encroachments upon the high sea would form a part of the defence of a country, and "come within the principle that a nation may do what is necessary for the protection of its own territory."

The passage which I conceive my friend was referring to, is a passage which, like that from Azuni, requires, in order to understand it, the whole passage to be read. I am reading now from page 58 of a printed report of the Judgment of Lord Chief Justice Cockburn.

It does not appear to me that the argument for the prosecution is advanced by reference to encroachments on the sea, in the way of harbours, piers, break-waters, light houses, and the like, even when projected into the open sea, or of forts erected in it, as is the case in the Solent. Where the sea, or the bed on which it rests, can be physically occupied permanently, it may be made subject to occupation in the same manner as unoccupied territory. In point of fact, such encroachments are generally made for the benefit of the navigation; and are therefore readily acquiesced in. Or they are for the purposes of defence, and come within the principle that a nation may do what is necessary for the protection of its own territory. Whether if an encroachment on the sea were such as to obstruct the navigation, to the ships of other nations, it would not amount to a just cause of complaint, as inconsistent with international rights, might, if the case arose, be deserving of serious con-
1125 sideration. That such encroachments are occasionally made seems to me to fall very far short of establishing such an exclusive property in the littoral sea as that, in the absence of legislation, it can be treated, to all intents and purposes, as part of the realm.

In other words, it defends and justifies the taking possession of a certain part of the sea, and permanently occupying it for the purpose of erecting light-houses.

Of course the President and other members of the Tribunal are aware that by the invention of a blind gentleman of the name of Mitchell, who invented the screw-pile arrangement, these piles are driven down in great depths of the sea, and upon these piles in many places, where there is no rock as a more secure resting place, many light-houses throughout the world are supported.

I think I have got to the end of the illustrations and of the cases cited by my learned friend with the exception of one set of cases, which may be called appeals in the nature of *argumentum ad hominem*, to which I have already incidentally referred namely: cases as to which there is a supposed analogy with the rights that the United States are here contending for; a supposed analogy conceived to be found in certain legislation of Great Britain, especially legislation in relation to her colonies and by her colonies. There is also a case of *Church* v. *Hubbard*, and some cases cognate to it, which I shall have a little later to refer to.

But I shall try to answer on this occasion the question addressed to me by the learned President before the adjournment as to the view of the British Government of the Greytown incident. You recollect, Sir, that you were good enough to address that inquiry to me.

The PRESIDENT.—Yes, Sir Charles.

Sir CHARLES RUSSELL.—I am now able to answer the inquiry. The matter became a subject of discussion in the House of Commons on the 19th of June, 1857, Lord Palmerston being then Prime Minister. In order to appreciate what follows, it is well to observe that the way in which the question arose was this: That in the bombardment of Greytown loss had been sustained by private persons, some of British nationality, some of French, and some of other nationalities; and the question was whether in the circumstances of that bombardment of Greytown, and according to principles of international law, the Gov-

ernments of those nationals would be justified in pressing upon the United States claims for compensation. The short answer will be found in the statement that they were regarded as acts of belligerent hostility, and that in the opinion of the Law Officers—I will read the opinion of the Law Officer of the day, a man of great eminence—it fell within the principle that innocent neutrals who suffer by the operation of belligerent acts in time of belligerency, had no claims which their Governments could press diplomatically. There were as usual in all cases of legislative bodies of any kind, I may say, and certainly of a popular character, diverse views, and persons were to be found
1126 to reproach the Government of the day for not having been more thorough and more strenuous in insisting that there should be compensation made. For instance, I see that Mr Roebuck, an eminent politician of that day, makes a more or less vehement attack upon Lord Palmerston because he has not done more; and Mr Disraeli, as he then was, Lord Beaconsfield, as he afterwards became, rather joins in that; but Lord Russell, who was at that time not in the Government of Lord Palmerston (and indeed, as some of you will recollect was on anything but good terms with Lord Palmerston, in 1857), supports the Government. What the Attorney General says is this:—the reference to Hansard is Third Series, vol. CXLVI, page 47.

(The Attorney-General, I ought to say, because it gives some weight to his opinion, was Sir Richard Bethel, afterwards Lord Westbury, Lord Chancellor of England.)

The Attorney General assured the hon. and learned member for Sheffield (Mr Roebuck) and the hon. Gentleman who had just sat down, that if the law advisers of the Crown had found that, compatibly with the international law of Europe, satisfaction could have been demanded from America for the losses sustained by British subjects at Greytown, they would unquestionably have pressed upon the Government advice to that effect. The opinion they arrived at was arrived at unwillingly and reluctantly by the law advisers of the Crown. But France also was concerned in this affair, and was she to be accused of truckling to America? In France they were obliged to come to the same conclusion, and France therefore as well as England had abstained from pressing any demand for satisfaction that could not legally be obtained. The experience of the proceedings between this country and America which he had had as law adviser of the Crown led him to a conclusion the reverse of that arrived at by the hon. Gentleman who had just sat down. If America were asked her opinion, she would say that she had reason to complain again and again of the strictness with which the law of this country and the principles of international law had been enforced against her. He defied the hon. Gentleman to point to a single instance in which England had given up a legal claim to satisfaction. Every jurist admitted that in a case like that of the Greytown bombardment no compensation could be enforced for the losses sustained. The principle which governed such cases was, that the citizens of foreign States who resided within the arena of war had no right to demand compensation from either belligerents, for the losses or injuries they sustained. As an instance of this doctrine he would beg the hon. Gentleman to call to mind the case of Copenhagen and the bombardment of other places.

I care not whether that was right or whether that was wrong. That was the view taken by the Law Officer, that it was a case of loss within the arena of war.

Now I come to the argument from the analogy of legislation in England which is relied upon by my learned friends. If I may be permitted to refer the Arbitrators to a convenient reference which will save the need of their constantly changing their books of reference, I would ask them to refer to the British Argument, at page 39.

Now may I make—without making it I hope in any acrimonious spirit—this one comment in reference to this legislation which I am about to call attention to. The facts are, with sufficient fullness and correctness in each of these cases, set out in the British Counter

1127 Case; and yet we have in the argument of the United States these cases reproduced as if they had not been explained, and the whole statement of explanation discarded as if it had not been made at all.

The PRESIDENT.—Perhaps that may be accounted for by chronology: that the Argument had been made before the Counter Case was delivered.

Sir CHARLES RUSSELL.—There was an extension of time; but if my friend says so I will accept that.

Mr. PHELPS.—Certainly not. We stand upon the Argument without any reference to chronology, and we expect to sustain it.

Sir CHARLES RUSSELL.—Then my friend will not accept the shield, Mr. President, which you are good enough graciously to offer.

Mr. Justice HARLAN.—What is your point? that the American Argument should have referred to the Counter Case and not reproduced the statutes in it?

Sir CHARLES RUSSELL.—My argument is—if it deserves to be designated by the name of argument—my observation is that whereas in our Counter Case we had stated the facts as they are—

Mr. PHELPS.—As you claim them.

Sir CHARLES RUSSELL.—*The facts as they are* as to this legislation in the United States Argument that statement of the *facts as they are* is entirely disregarded as if it had not been made; the whole statement is ignored. It is not an important matter; but I think it is fitting to make some reference to it because one would have expected that when in the British Counter Case the explanations were given, some notice would be taken of those explanations, and if they were incorrect, that the points in which they were incorrect would have been pointed out.

On page of our Argument 39 we state that:

The claim of the United States to rest their case on the precedents of the laws of other nations forms a distinct branch of their case, and requires to be specially considered.

Such laws are referred to by the United States, for three objects:

1. To endeavour to prove a uniform practice of nations to protect seal life from destruction by means of extra-territorial legislation.

2. To endeavour to show a uniform practice of nations of extending the provisions of their fishery laws beyond the 3-mile limit; and of making these provisions applicable to foreigners.

3. To show that other examples of extra-territorial jurisdiction are to be found in the laws of other nations.

The deductions desired to be drawn by the United States from the examples cited are:

From 1. That the United States law under which British vessels have been seized is justified by the laws of other nations for the protection of seals.

From 2. That the law is justified by analogy to the fishery laws of other nations and.

That the application of this law to foreigners beyond the 3 mile limit is also justified by example and analogy.

From 3. That the law, and more especially in its application to foreigners beyond the 3-mile limit, is further justified by analogy of other extra-territorial laws not dealing with fisheries.

1128 Then the scheme of consideration of these cases is explained

It is proposed to demonstrate in the following Argument that these premises are not well founded, and that the position assumed by the United States is untenable.

With regard to the argument from the practice of other nations, or from analogy to the practice of other nations, it is submitted that the following propositions can alone be maintained.

To warrant any exceptional departure from the principles commonly accepted by all nations as part of the law of nations, it is essential that there should be an agreement between all:

1. As to the sufficiency of the causes calling for such exceptional legislation.

2. As to the means for remedying such causes, i. e., as to the purport of such gislation.
This follows from the fundamental principle on which the law of nations rests, iz., consent of nations.
This subject has already been dealt with, but it is necessary to examine categorally the examples of extra-territorial legislation adduced by the United States in der to show that they utterly fail to support the argument for which they are ted.

The first citations are in support of the proposition that seal life is rotected by extra-territorial law of other countries. The instances ven are the Falkland Islands, New Zealand, Cape of Good Hope, anada and Newfoundland.
Those are British territories. These are followed by Sweden and Norway, Russia, Germany and Holland, with reference to the Greenland Jan Mayen fisheries; the other countries cited are Russia, Uruguay, hile, Argentine Republic and Japan.
I cannot do better than quote in substance what is said here.
You will observe, Mr. President, that in some of these passages some the words are printed in Italics. I think it will be found in some of ese cases that they are so printed in the United States Case or Counter ase or in the Appendix. Now as regards the Falkland Islands:

The Act providing a close time for seals is No. 4 of 1881. It recites that the seal hery of the islands was once a source of profit to the colonists, but has been hausted by indiscriminate and wasteful fishing, and that it is desirable to revive id protect this industry by the establishment of a close time *within the limits of is Colony and its dependencies.*
The Statute then enacts that a close time shall be observed *within the limits of is Colony and its dependencies* from the 1st October to the 1st April.
The words italicised have a special meaning.

And here I call attention to a principle which you will at once recognize, the difference between the powers of legislation of what may e called a supreme body, and the powers of legislation which may be xercised by a subordinate Legislature, which is the creation of a upreme Legislature. For instance, the Parliament of Westminster can egislate for the whole of the Queen's dominions, even for those portions f the dominions to which the Queen has given constitutional Government, and which has its own powers of legislation; and it can also legislate for the subjects of the Queen all the world over. But 1129 colonial Legislatures can legislate effectively only for and within the limit of their own actual territory. They cannot extend the ffect of their legislation beyond that territory, or even to bind the subects of the Queen beyond that territory.
This illustration from the Falkland Islands is referred to on page 168 of the United States Argument, the third paragraph from the top:

An ordinance of the Falkland Islands, passed in 1881, established a close season for the islands and the surrounding waters, from October to April in each year. Two of the islands lie 28 miles apart, and this regulation is enforced in the open sea lying between them.

You will observe that after that statement my learned friend gives, as it were, authorities for the statement, "Report of U. S. Fish Commission"—I do not know what that is, or where it is—"affidavit of Capt. Budington; Case of the United States, Appendix, Vol. 1, p. 435"; but for my purpose I will read from page 221 of the United States Case. Having set out this ordinance at the bottom of that page, they go on to say:

Capt. Budington

This is the expert in law—

—an experienced navigator and seal hunter in southern waters, visited that region in January, 1892, and he states, under oath, that the ordinance of 1881 is enforced in the sea surrounding those islands outside the three-mile limit, and that it would be deemed a violation of the law to take seals during the close season between the Falkland Islands and Beauchene Island, twenty-eight miles distant.

When you read the affidavit, if you will bear in mind the words I have just read, I think you will find that it has been put a little too strongly in the Case; because Budington's affidavit, which is in another volume—Volume 2 of the Appendix, page 593—says, under the head of the Falkland Islands:

At one time these islands were very abundant in seal life, but excessive and indiscriminate killing has nearly annihilated them.

That is not the fact I am upon.

This fact was recognized by the Government of the islands, which passed an ordinance in 1881 establishing a close season from October to April for the islands and the seas adjacent thereto. My understanding of this ordinance was that the Government would seize any vessel taking seals close to or within 15 or 20 miles of the islands.

So we have got this gentleman, who may be a good mariner, but hardly an expert in law, to say that his "understanding of this ordinance was that the Government would seize any vessel taking seals close to or within 15 or 20 miles of the islands."

Mr. FOSTER.—The affidavit shows he was a seal hunter returned from the South Seas.

Sir CHARLES RUSSELL.—And he may go back to the South Seas, so far as I am concerned. I am dealing with him as an authority on this subject, as a lawyer. I am pointing out that what he says in
1130 this affidavit is not that he was ever stopped, not that he heard of anybody that ever was stopped, not that he heard anybody said that anybody ever was stopped, but that this hunter, who had returned from the South Seas—what recommendation that is to him, I do not know—says:

My understanding of this ordinance was that the Government would seize any vessel taking seals close to or within 15 or 20 miles of the islands. I understood this ordinance was passed on the ground that the seal resorting to these islands was the property of the Government and therefore it had a right to protect them every where. The Government, however, gave licences to certain parties. . . . . to take seals during the close season.

Senator MORGAN.—Sir Charles, are all of those legislative acts of the colonies repealable by the Parliament of Great Britain?

Sir CHARLES RUSSELL.—The machinery is this. The assent of the Crown is absolutely necessary to give effect to any act in the nature of a legislative act by a Colony, whether it is a colony with a constitution or a Crown Colony. That is the way it stands. It would be quite within the powers of Parliament to pass legislation which should gainsay this, if it chose to do so.

Senator MORGAN.—Of any act of the Canadian Parliament, for instance?

Sir CHARLES RUSSELL.—Oh certainly, if it chose to do so. The Imperial Parliament, which, it should be borne in mind, has created the Legislature of Canada, for instance, has the power to modify that creation, and if necessary to undo it.

Senator MORGAN.—We have a system somewhat akin to it in the United States. The acts of the territorial Legislatures are considered as Acts of Congress, unless Congress intervenes to repeal or modify

them, so that they become the supreme authority of the Government of the United States. What is done by the colony is done by the Crown.

The PRESIDENT.—Unless it is cancelled?

Senator MORGAN.—Yes.

Sir CHARLES RUSSELL.—It is to me a most painful thing to have to refer you to so many books, but it seems to be absolutely necessary.

The PRESIDENT.—Could you not refer us directly to the statutes of these Colonies?

Sir CHARLES RUSSELL.—That is what I am going to do. You will find them in Volume 1, page 435, of the United States Appendix.

Mr. FOSTER.—We print all those statutes.

Sir CHARLES RUSSELL.—Yes.

Whereas the seal fishery of these islands, which was at one time a source of profit and advantage to the colonists, has been exhausted by indiscriminate and wasteful fishing, and it is desirable to revive and protect this industry by the establishment of a close time, during which it shall be unlawful to kill or capture seals within the limits of this colony and its dependencies:

Be it therefore enacted by the Governor of the Falkland Islands and their dependencies, with the advice and consent of the Legislative Council thereof, as follows:

1. No person shall kill or capture, or attempt to kill or capture, any seal
1131 within the limits of this colony and its dependencies, between the days hereinafter mentioned (which interval is hereinafter referred to as the close season); that is to say, between the first day of October and the first day of April following, both inclusive; and any person acting in contravention of this section shall forfeit any seals killed or captured by him and shall in addition thereto incur a penalty not exceeding one hundred pounds, and a further penalty of five pounds in respect of every seal so killed or captured.

2. Any owner or master or other person in charge of any ship or vessel who shall permit such ship or vessel to be employed in killing or capturing seals, or who shall permit any person belonging to such ship or vessel to be employed in killing or capturing as aforesaid, during the close season, shall forfeit any seals so killed or captured and in addition thereto shall be liable to a penalty not exceeding three hundred pounds for each offence.

3. Every offence under this ordinance may be prosecuted and every penalty under this ordinance may be recovered before the police magistrate or any two justices of the peace in a summary manner, or by action in the supreme court of this colony, together with full costs of suit: *Provided*, that the penalty imposed by the police magistrate or two justices shall not exceed one hundred pounds, exclusive of costs.

One-half of every penalty recovered under this ordinance shall be paid to the person who prosecuted the offence or sued for such penalty.

All fines, forfeitures, and penalties recovered under this ordinance, where not otherwise hereinbefore provided, shall be to Her Majesty, her heirs, and successors, and shall be paid to the treasurer for the use of the government of this colony.

For all purposes of and incidental to the trial and punishment of any person accused of any offence under this ordinance and the proceedings and matters preliminary and incidental to and consequential on his trial and punishment, and for all purposes of and incidental to the jurisdiction of any court or of any constable or officer with reference to such offence, the offence shall be deemed to have been committed either in the place in which it was actually committed or in any place in which the offender may for the time being be found.

4. Where the owner or master of a ship or vessel is adjudged to pay a penalty for an offence under this ordinance the court may, in addition to any other power they may have for the purpose of compelling payment of such penalty, direct the same to be levied by distress or arrestment and sale of the said ship or vessel and her tackle.

5. In this ordinance the expression "seal" means the "fur seal," the "sea otter," the "hair seal," the "sea elephant," the "sea leopard," and the "sea dog," and includes any animal of the seal kind which may be found within the limits of this colony and its dependencies.

Senator MORGAN.—Now, Sir Charles, before you close this subject, I wish to ask you a question, for information, merely. I wish to know whether the British Parliament has repealed any of these Acts of any of the Colonial Legislatures, or modified them, having reference to protection of seal life?

Sir CHARLES RUSSELL.—I am not aware of such a thing having happened. There is not one that applies.

Senator MORGAN.—I am not speaking about where they apply. I want to know whether the British Government is responsible, as a Government, in its legislation, for these Acts.

Sir CHARLES RUSSELL.—So far as the responsibility means that it has not interfered—

Senator MORGAN.—That is what I mean.

1132 Sir CHARLES RUSSELL.—With the legislative action within the constitutional rights of the particular dependency, whether a Crown Colony or self-governing Colony, I think that is correct.

Senator MORGAN.—No question has been made of the power of the Colonies to pass the respective laws that they have passed?

Sir CHARLES RUSSELL.—As far as I am aware, no. And also, I add to that, as far as I am aware, there is no reason why any question should be raised.

Senator MORGAN.—Perhaps not. I only wanted to know what the fact was.

Sir CHARLES RUSSELL.—As far as I know, that is the fact; but if you can give me any particulars in any precise case, I shall be glad to look it up.

Senator MORGAN.—I do not refer to any case at all. I merely wanted to know whether the Tribunal of Arbitration were to consider these statutes upon the colonial statute books as being statutes enacted by the consent of the British Crown?

Sir CHARLES RUSSELL.—I have stated what the facts are, Sir, and they will speak for themselves. I think I have already answered the question.

Senator MORGAN.—I supposed that you could tell me what the fact is in regard to it.

Sir CHARLES RUSSELL.—That legislation, so far as I am aware—I am proceeding to examine it in detail—is all strictly limited according to, and within, the proper constitutional lines. It is territorial legislation and territorial legislation only.

The PRESIDENT.—But I believe Senator Morgan is right in saying that as long as it has not been objected to by the Crown of England, the Crown of England is held responsible for it. You have just stated that, I think.

Sir CHARLES RUSSELL.—I think you probably, Sir, for a moment were otherwise engaged. I pointed out that as regards a British Colony, whether it has no constitution, and therefore no legislative assembly of its own, or whether it has a constitution, the assent of the Queen has to be given to such legislation before it can become operative. In either case, it is given through the Governor of the particular Colony, as in the case of Canada. The Crown moreover, even after assent has been given to a legislative act by the Governor in the name of the Queen, and it has become a law, has the power of disallowing any colonial Act, a power which must however be exercised usually within a fixed period of time. Great Britain has assented, and in that sense, is clearly responsible for the legislation.

Lord HANNEN.—They are all either with the consent, or without the dissent, of the English Government?

Sir CHARLES RUSSELL.—Quite so. I rather preferred to answer the question by stating what the actual facts were, which I have done. I think at the moment, sir, you were engaged, when I was explaining it to Senator Morgan.

The PRESIDENT.—I believe that answers Senator Morgan's ques-
on.

Sir CHARLES RUSSELL.—I think it does. I intended it to be an answer, and I think the Senator so understood.

133 Senator MORGAN.—I understand this: that without the dissent of the Queen or the Government of Great Britain, in the se of Crown Colonies, their Statutes stand as if they had been enacted Parliament, and that that is the same rule also in regard to what u call the constitutional Colonies: there being no dissent, the law is if enacted by Parliament in legal effect, of course.

Sir CHARLES RUSSELL.—Now I wish if I may to conclude this case the Falkland Islands, before the Court rises, and I will not repeat y observations which were more or less in the nature of a complaint: t this is what we say in our Counter Case, which I understand my rned friend had before him when his Argument was prepared. This on page 87.

In order to suggest that the provisions of this Ordinance are extended to nonterorial waters, Captain Budington, a navigator and seal-hunter, is quoted as an thority for the statement "under oath" that this Ordinance is enforced outside e 3-mile limit.

It will be found, however, on reference to his affidavit, that Captain Budington ly swears as to what was his "understanding" of the Ordinance; and as to any stance of the enforcement of this law against foreigners outside the ordinary limit jurisdiction, he offers no evidence whatever.

The Ordinance, with reference to the close season thereby established, enacts:

And it repeats the section, which is confined in its operation to "the mits of this Colony and its dependencies".

This is the statement put in our Counter Case and before the Argument was prepared.

The terms of the Ordinance are expressly confined to the limits of the Colony and no time since the Falkland Islands have belonged to Great Britain, whether before after the making of the Ordinance in question, has any attempt been made to terfere with the capture of seals outside the ordinary territorial waters. This fact noted in the British Commissioners' Report.

There is a distinct statement. First of all, our position is this, that e law itself is in fact strictly limited territorially; and secondly, at, in fact, it has never been asserted or put in force against a reigner outside the 3-mile limit.

Senator MORGAN.—In regard to these colonial Acts in regard to als, do any of them make leases of the right to take seals?

Sir CHARLES RUSSELL.—I am not aware that they do. They grant hat might be called hunting licenses.

Senator MORGAN.—Yes.

Lord HANNEN.—What is the page of the British Commissioner's eport?

Sir RICHARD WEBSTER.—It is referred to on page 87, my Lord, of e Counter Case, and it is quoted at page 156.

Lord HANNEN.—But what is the passage at page 156 of the British ommissioners' Report that it is referred to?

The PRESIDENT.—Are you sure that it is the Behring Sea Commisoners?

Sir CHARLES RUSSELL.—Yes, I will give you the passage.

134 Mr. Justice HARLAN.—I suppose it is in reply to what Felton says in answer to question 3.

Sir RICHARD WEBSTER.—Yes, I think it is.

Sir CHARLES RUSSELL.—That is, of course, a statement of fact that an be challenged if not correct.

Mr. PHELPS.—What is the statement of fact?

Sir CHARLES RUSSELL.—I have just read it at page 87 of the Case.

Mr. PHELPS.—But I mean in the British Commissioners' Report.

The PRESIDENT.—Yes, the evidence of it.

Sir CHARLES RUSSELL.—I must be allowed to state it in my own way. There is the statement of fact which is capable of being challenged if not true. Now I will show the reference to the British Commissioners' Report.

There is set out on page 154 a circular letter of enquiry which they addressed to, among other Colonies, the Falkland Islands: it is as follows:

The Department of Fisheries of the Dominion of Canada, in connection with questions relating to the fur-seal fisheries of the North Pacific, is desirous of obtaining all possible information relating to the fur-seal fisheries of the Southern Hemisphere. The southern fur-seal, or "sea-bear" (of the family of eared seals, or *Otaridæ*), is known to have formed the object of an important industry in the early part of the present century, but the islands on which it once abounded are now reported, and believed to be, almost entirely depleted of seals. As the habits and life-history of the fur-seal of the North Pacific appear to be closely similar to those of the allied seals of the Southern Hemisphere, it is thought probable that the history of the decline of the southern fisheries may afford some facts having a direct bearing on the fur-seal fisheries of the North Pacific, and may serve to indicate a proper mode of protection to be accorded to these fisheries, if such should be found necessary.

In this connection, it would be of particular interest to know for each of the seal islands or sealing-grounds of the Southern Hemisphere:

1. Whether the decline or destruction of the fishery is attributable to the slaughter of the seals while on shore at their breeding-places, or to their pursuit at large on the circumjacent ocean.

2. In what manner the fur-seal fishery has been and is conducted in each particular locality.

3. Whether any, and, if any, what measures have been taken by various Governments towards the protection of the fur-seal fisheries in their territories or in places within their jurisdiction; and, further, if any such measures are known to have proved successful in preserving or rehabilitating the fisheries.

4. Generally, any particulars as to the life-history of the animal, its migration, season of bringing forth its young, and the habits of the seals while engaged in suckling and rearing the young.

Now the answer is on page 456.

The main cause is due to the reckless and indiscriminate slaughter of the seals during their breeding season.

And so on.

H. H. WALDRON.—The decline in the Southern Hemisphere, including the Falklands, is to be attributed to the indiscriminate slaughter of the females during the breeding season, whereby the young perish. Pursuit in the high seas is not carried on to any extent.

1135 Then.

Question 2. In what manner the fur-seal fishery has been, or is, conducted in each particular locality.

J. J. FELTON.—Formerly, by means of whale-boats; later on, by cutters and schooners. They would be fitted out for the "pupping" and the "shedding" seasons; as many men would be taken as possible, armed with clubs, spears, and guns, and, landing at the breeding places, they would line the beach and endeavour to turn the seals from taking to the water.

And so on, and that is repeated.

Whether any, and, if any, what measures have been taken by various Governments towards the protection of the fur-seal fisheries in their territories, or in places within their jurisdiction; and, further, if any such measures are known to have proved successful in preserving or rehabilitating the fisheries.

J. J. FELTON.—In the Falklands, since the close season was enacted, there has been an increase of seals; but foreign schooners occasionally break the law.

J. J. GOODHART.—See answer to Question I.

E. NILSSON.—Does not see any improvement since the Law enacting a close season as passed.
H. WALDRON.—To the same effect as J. J. Felton.

I think that is all, as far as I can make out.
Mr. Justice HARLAN.—The last answer on that page has a reference ı the Falkland Islands.
Sir CHARLES RUSSELL.—Thank you Sir, I will read it:

H. WALDRON.—Owing to keen pursuit, the seals prefer caves and ledges of rocks ıder high cliffs to form breeding rookeries. The fur-seal hauls up to breed in nuary, the young leaving in May for other rookeries with both "wigs" and "clap-ıtches". There is no regular migration, but it is probable that, when hard pressed, ey leave the South Shetlands and mainland for the Falklands. "They are peculiar liking some places for several years, and then at once going away and not hauling there again, apparently without cause, in some instances where but few were lled and in others quite unmolested."

Lord HANNEN.—That does not refer to the meaning it seemed to be ıoted for.
Sir CHARLES RUSSELL.—I have just pointed out to my learned ıend I do not think it justifies the statement that the British Com-issioners affirmed that fact.
Sir RICHARD WEBSTER.—It was not intended to. It is independent. ıere is no evidence given in support of it. It is a statement of fact ı behalf of the Government in the Counter Case, and that fact is noted the British Commissioners' Report and is set out at page 193 of the ritish Commissioners' Report and referred to in section 129.
Lord HANNEN.—However, your idea is that this Ordinance does not ıal with the high seas at all.
Sir RICHARD WEBSTER.—Yes, there has been in fact no assertion of ; there has been in fact, no exercise of the Act as if it did apply to e high seas: and those are facts which can be challenged and contra-dicted, if not accurate. Mr. Budington does not vouch that he .36 ever heard of anybody, who ever heard of anybody else, who ever said that he had been prevented sealing: he only states that s understanding of the Ordinance is so and so.
General FOSTER.—A little more than that.
Sir CHARLES RUSSELL.—No, I really read every word he said.
General FOSTER.—I beg your pardon. I followed closely.
Sir CHARLES RUSSELL.—Well, I do not complain, but I really did. Now, one at least of the Tribunal is aware of the very close scanning ı Act requires, before it is intimated that Her Majesty will not dis-low it. It is a duty which falls upon the permanent legal adviser of ıe Colonial Office, and in cases of importance or difficulty reference is so made to the Law Officers. It would be their duty to report against ıy Colonial Act which affected to assume a jurisdiction which it was yond the competence of the Legislative Body, whatever it was, to ercise. If they so advised in respect of any act, the Privy Council, ı that report, would advise the Queen to disallow it.
The PRESIDENT.—Well, I think we will adjourn now.
[The Tribunal thereupon adjourned until Tuesday next, the 30th of ıay, at 11.30 o'clock.]

TWENTY-NINTH DAY, MAY 30TH, 1893.

The PRESIDENT.—Sir Charles, we are ready for you to resume your argument.

Sir CHARLES RUSSELL.—Mr. President, I go straight to the resumption of the examination of the instances of legislation by various countries adduced by the United States which they contend are analogous, involve an assumption of jurisdiction which they say justifies or strengthens their position. I have considered the legislation of the Falkland Islands; and I would ask the Tribunal to open the British printed Argument at page 41. At the bottom of that page, the legislation of New Zealand is considered; and this is, as we submit, a conspicuous instance of the misunderstanding of the United States of the character of this legislation. What is said about it in the Argument of the United States is at pages 167 and 168; but I only need refer to page 168 which sums up what they conceive to be the result. It is the second sentence on the top of that page of their Argument. Summing up the result, as they conceive it, they say:

> In other words, authority was conferred by these Acts to seize vessels for illegally taking seals over an area of the open sea extending at the furthest point 700 miles from the coast; and the Government of New Zealand has since kept a cruiser actively employed in enforcing these regulations.

That is to say, regulations extending 700 miles from the coast. That will be found to be an entire misunderstanding of the subject.

Now, I will content myself with reading what is the actual fact as to that legislation. On page 41 of the British Argument we say:

> The Statute No. 43 of 1878 for the protection of seals establishes a close season; no reference is made to waters, but the Governor may by order exclude any part of the Colony from the provisions of the Statute.
>
> A "public fishery" is defined to be "any salt or fresh waters in the Colony, or on the coasts or bays thereof;" it includes artificial waters, and extends to the ground under such water.
>
> Further, it is provided that offences against the Act committed on the sea-coast or at sea within one marine league of the coast are to be deemed as having been committed in a "public fishery."

There is a therefore, clear limitation to the one marine league from the coast.

> "The Fisheries Conservation Act of 1884" applies to certain waters of the Colony, the term "waters" being defined to mean "any salt, fresh, or brakish waters in the Colony, or on the coasts or bays thereof." The Governor is enabled to make regulations for the protection of fish, oysters, or seals.
>
> By "The Amendment Act No. 27 of 1887" the penalty for violating the principal Act in its application to seals is increased.
>
> 1138 Vessels illegally taking seals are declared to be forfeited, and Her Majesty's vessels and officers are empowered to seize such vessels "*if found within the jurisdiction of the Government of the Colony of New Zealand.*"
>
> The Act also allows vessels within the same jurisdiction to be searched.
>
> The United States Case contains an extraordinary mis-statement:

low, here is what the United States say with regard to this legisla-
ı of New Zealand.

he area designated as "the colony" is taken to mean the area specified in the Act
& 27 Vict., cap. 23, sec. 2] creating the Colony, which defines its boundaries as
ıcident with parallels 33° and 53° south latitude, and 162° east and 173° west
gitude.
he definition in the Act [The Fisheries Conservation Act, 1884] of the term "waters"
cates that it applies to the entire area of the Colony, of which the southeastern
ıer is over 700 miles from the coast of New Zealand, although a few smaller
ıds intervene.

hen the Argument proceeds—

the Map [which I will not stop to refer to, the Tribunal can refer to it for them-
es] in the United States Case an area coloured pink is shown, comprising the
ıts between the limits of latitude and longitude, to found the contention that
e waters are included within the colonial limits.
ıe words of the Imperial Statute 26 & 27 Vict., cap. 23, sec. 2, above referred to,
ırtheless, are clear and explicit, and are not capable of being misunderstood.
ıe designation of the Colony in that Statute is as follows:
ıe Colony of New Zealand shall, for the purposes of the said Act and for all other
oses whatever, be deemed to comprise *all territories, islands, and countries lying*
een 162° east longitude and 173° west longitude, and between the 33rd and 53rd
llels of south latitude.
ıly the territories, islands, and countries *lying between* these limits of latitude
longitude are thus seen to be included within the Colony.

ı other words, in interpreting this Statute, the United States rep-
ıntatives have fallen into what we conceive to be precisely the same
take which they fell into in construing their own Treaty of Cession
.867 between themselves and Russia: that misconception being that
ıuse that Treaty of 1867 described a certain line drawn from Behring
ıits south-westwards beyond the Aleutian Chain, that thereby there
ı a cession as of territory of all the waters that lay to the east of
t line.
ll that is said here is that within those limits whatever is territory
art of the Colony, no more than that, just as the words used in the
aty of 1867 were quite apt words to describe the cession to America
ıll that was territory lying within those degrees of latitude and of
gitude. These facts were stated in the British Counter Case and
the argument is repeated in the print by the United States as if the
ıanation had not been made.
low the Cape of Good Hope comes next in order, on page 43, and I
ice that the printed Argument of my learned friend does not refer
his case of the Cape of Good Hope. If I am to assume that that is
en up by my learned friends, I will pass it without any notice, but
ess my learned friend gives me that intimation I must of course
ice it. It is mentioned by them in their Case. It is not referred to
in their Argument, but we have in our Counter Case, at page 89,
9 dealt with it and explained what the facts were, and that has
not been answered. I will read the explanation which is shortly
in page 89.
t proceeds thus:

is stated in the United States Case that "in the Colony of the Cape of Good Hope
ing is prohibited at the rookeries and in the waters adjacent thereto, except
er stringent regulations".
he evidence offered in support of these allegations consists of the following
ements:
'. C. B. Stamp: who says: I am told, although I know nothing about it, that
ılations of some kind have been made in the Colony of the Cape of Good Hope.
. Comer: who says: The rookeries "are in the possession or control of a com-
y, as I was then informed, which has the exclusive right to take seals there. We
not dare to go to those rookeries because sealing was prohibited, and we would
have been allowed to take them in the waters adjacent thereto."

That does not further their view at all. Then it proceeds:

The Regulations in force in this Colony are of the character which appears from the Government Notice which is printed in the Appendix to the British Commissioners' Report. By this Notice all persons are prohibited "from disturbing the seals on the said island" [in Mossel Bay] and are warned from trespassing there.

The Government Agent states that there is practically no pursuit of the animals in the water on these coasts. The system of killing the seals is the same throughout all the colonial islands, namely, with "clubs", by men landing in boats.

Then the explanation further proceeds:

As a matter of fact, the legislation at the Cape of Good Hope is entirely confined to the protection of seals on the islands.

There is no allegation of any assertion of any right inconsistent with that explanation which I have now read.

Now the case of Canada, again, is not referred to in the printed Argument of my learned friends, and I will pursue in relation to that the same course. Whether I am entitled to assume that the explanation given in our Counter Case was satisfactory or not, I do not know. I am entitled to say that the explanation was given of what the actual facts were in our Counter Case, and after that explanation is given, the matter is not again referred to or apparently relied upon in the United States Argument. It is referred to in the British Counter-Case, at page 89:

Turning from the fur-seal to the other varieties of seals, it is alleged in the United States Case that, as regards the hair-seal in the North Atlantic—

"They have thrown about them upon the high seas the guardianship of British statutes... Canadian statutes prohibit all persons, without prescribing any marine limit, from disturbing or injuring all sedentary seal fisheries during the time of fishing for seals, or from hindering or frightening the shoals of seals as they enter the fishery."

The only Canadian Statute referred to is the Fisheries Act of 1886, which undoubtedly affects Canadian subjects upon the high seas, and all persons within the territorial waters of Canada, but asserts no jurisdiction over foreign subjects outside those waters.

Senator MORGAN.—That is the statement from your Counter Case.

Sir CHARLES RUSSELL.—Yes, which is not challenged in the
1140 printed Argument subsequently delivered by the United States, and is the fact. I mean it states what the fact is. I am entitled to assume that in all these cases, unless the contrary is shown, that no case can be adduced of any assertion of a right outside the territorial waters. If my learned friends could have produced instances of such assertion outside territorial waters affecting other than British subjects, it would have been something to the point—it would have been at least the *argumentum ad hominem;* but it is not even that in the absence of any such evidence. They give an extract from the Canadian Statute which gives no justification whatever for the statement which is found in their Case; and the Tribunal will be good enough to bear in mind—I will refer to it later so as not to repeat myself—the paragraph which I have already explained as to colonial legislation, namely, that the power to legislate which is conceded to Colonies which have a representative system of Government—a constitutional Government, as it is shortly called—that that being a delegated power by the Imperial Parliament, it gives to the Colonial Legislature absolutely no power, even if it affected to exercise it, which it has not done, to legislate one inch beyond the actual territory. I shall point to some remarkable decisions of the Privy Council, which is the Appellate Court from the Colonies, which have given effect to that view of the powers of Colonial Legislatures.

Senator MORGAN.—What was the penalty imposed in the Canadian Act upon the taking of hair-seals.

Sir CHARLES RUSSELL.—I will tell you, Sir, in one moment. I have not got it in my mind at present.

Mr. Justice HARLAN.—It is at page 441.

Sir CHARLES RUSSELL.—I think that for hunting or killing whales, seals or porpoises, and so on, it is a penalty not exceeding $300, or imprisonment not exceeding six months. Everyone who with a boat or vessel knowingly disturbs, etc. a seal fishery is to be liable to a penalty not exceeding $60, or in default one month, and is liable to pay such damages as are assessed by the Fishery Officer or Justice of the Peace. The Statutes are set out page 441 of the Appendix, vol. 1, of the Case of the United States.

Mr. Justice HARLAN.—The first section relates to rockets and explosive instruments, and the next to sedentary seal fisheries. I believe none of the provisions relate directly to seal hunting.

Sir CHARLES RUSSELL.—No.

Senator MORGAN.—Not to fur-seal hunting.

Lord HANNEN.—It was included at any rate in the general description.

Sir CHARLES RUSSELL.—I am informed by Mr. Tupper that these Statutes apply to the shore fishery.

Senator MORGAN.—They relate to hair-seals and not fur-seals.

Sir CHARLES RUSSELL.—I should not say it related to hair-seals only, if there are such things as fur-seals in that neighbourhood, because the phrase is "seals" generally.

1141 Lord HANNEN.—It would include both classes of seals.

Senator MORGAN.—There are no fur-seals in the Atlantic.

Lord HANNEN.—I dare say.

Sir CHARLES RUSSELL.—Very likely; that probably is so.

In reference to Mr. Justice Harlan's reference to the use of any explosive weapons for the purpose of fishing, I am reminded *à propos* of an entirely different matter by Mr. Tupper, which Mr. Phelps will be able to correct if erroneous,— it is rather in reference to the illustration given by Mr. Phelps as to whether it would be a defensible act to use dynamite at sea to kill fish,— Mr. Tupper informs me that, by concert between the United States and Canada, each of these communities has passed regulations against the use of dynamite.

Mr. TUPPER.—No.

Sir CHARLES RUSSELL.—No, that is not so. I am now told that they, foreseeing the possible danger that might ensue to interests which are interests not only of one country but of both, have concerted measures by their own legislation to deal with the use of anything of that kind.

Senator MORGAN.—Can Mr. Tupper cite the Tribunal to the arrangement or regulation between the United States and Canada on the subject of mackerel fishing?

Sir CHARLES RUSSELL.—Well, this is not in reference to what I am talking about; but by all means, if you wish to ask Mr. Tupper, do so, Sir. It is rather an interruption of my argument.

Mr. TUPPER.—The position of that matter is shortly this. The United States have legislated touching the taking of fish in their waters by purse-seining, and have prohibited the catching of mackerel in the United States waters during the spawning period of the mackerel season. Canada has prohibited the use of purse-seines in Canadian waters for the whole year; that is from January till December; and,

by an exchange of notes, the British Government, representing Canada, and the United States have now arranged to discuss a proposal for dealing with the mackerel fishery, if necessary, outside the 3-mile limit of the different countries.

Senator MORGAN.—I wish to enquire if the basis of that Agreement was not the fact that this method of purse-seining was an injury to young mackerel.

Mr. TUPPER.—Yes, destroying them in great quantities.

General FOSTER.—As I participated with Mr. Tupper in that negotiation I may refresh his memory in regard to it. I understand that a commission of experts has been appointed by the two Governments to settle the whole question of the fishing interests of the two countries in the adjacent waters, no mention being made of mackerel fishing or purse-seining whatever, according to my recollection. It covers the whole question of the fisheries.

Mr. TUPPER.—Well we differ upon that and we can produce the correspondence if necessary.

1142 Sir CHARLES RUSSELL.—At all events Mr. Tupper thinks not and whether it is, or is not, it is wholly immaterial. It is a very good illustration of what I referred to several days ago of where, for instance, trawling is found to interfere with sealing on the ground that it involves the loss of small fishes, nations have come by conventions (where the law cannot help one or the other) to mutual arrangements for the protection of their respective interests. It is a very good illustration, and all the better if Mr. Foster is correct in saying it is not limited to mackerel fishing, but has a wider and more general application. The illustration becomes for that reason the stronger and not the weaker.

Lord HANNEN.—I see from the passage cited from the Canadian Statute that they catch the seals there with nets.

Sir CHARLES RUSSELL.—Yes apparently my Lord, and I believe the British Commissioners' Report further suggests that nets should be disused, and I think some time ago the question was asked by Lord Hannen why it was that nets were given up. I have since asked for the explanation, and the reason is that the nets frequently include very young seals as well as seals which are the object of capture, and very often result in the life of the younger seals being lost, and that is the reason why the Commissioners recommended its disuse.

I have said all that I need say about Canada. Now about Newfoundland. The observations on the part of the United States will be found at page 444, and it is also referred to at page 168 of the American Argument.

(1) That no seals shall be killed in the seal-fishing ground lying off the island at any period of the year, except between March 14 and April 20, inclusive, and that no seal so caught shall be brought within the limits of the Colony, under a penalty of $4,000 in either instance.

(2) That no steamer shall leave any port of the Colony for the seal fisheries before six o'clock a. m. on March 12, under a penalty of $5,000.

(3) That no steamer shall proceed to the seal fisheries a second time in any one year unless obliged to return to port by accident.

This act extends and enlarges the scope of a previous act, dated February 22, 1879, which contained similar provisions, but with smaller penalties, and also the provision which is still in force, that no seal shall be caught of less weight than 28 pounds.

That is the statement in the United States Argument, and it will be observed, to begin with, that there is no allegation there that that applies to foreigners at all.

Now our statement in reference to it is at page 44 of the British Argument.

The Seal Fishery Act, 1889, 42 Vict., cap. 1, established a close time for seals, and prohibits the killing of "cats" [immature seals] in order more efficiently to preserve this close time. Steamers are not allowed to leave port before a certain day.

The Seal Fishery Act, 1892, provides more stringent regulations for the observance of the close time, and heavier penalties for leaving port before a certain day.

Seals killed in breach of the close time are not to be brought into any port of the Colony or its dependencies under a penalty of 4,000 dollars.

1143 Steamers are forbidden from going on a second trip in any one year, and if they shall engage at any time in killing seals at any place within the jurisdiction of the Supreme Court of Newfoundland after returning from the first trip they shall be deemed to have started on a second trip.

From these Statutes the following conclusions are drawn in the United States Case:

1. That Great Britain and its dependencies do not limit their Governmental protection to the fur-seal; it is extended to all varieties of seals wherever they resort to British territorial waters.

2. And they have thrown about them upon the high seas the guardianship of British Statutes.

It is admitted that the principle of providing a close time for seals has been adopted by British legislation as essential to the preservation of seal life.

It is denied that any country has the power to enforce such close-time regulations beyond the territorial waters against subjects of a foreign nation, though it may do so as regards its own subjects; and neither Great Britain nor her Colonies have ever departed or attempted to depart from this principle.

It is denied that the inferences drawn by the United States in respect of the legislation of some of the Colonies already considered are warranted. The principles of English law show conclusively that such inferences are unsound; it has already been shown that they are not in accordance with the facts; and no evidence has been adduced by the United States to support them.

Now I have one word further to say in relation to this statute. It has been objected by my friend, Mr. Phelps, in his Argument, and pointed to also by Mr. Coudert, that it was absurd to suppose that, where there was a valuable fishery carried on in the neighbourhood of the territory of a particular Power, that Power could put up with a state of things in which its own subjects there were to be prohibited during certain seasons from fishing, and yet that foreigners would not come under that regulation. That was the case that my friend Mr. Coudert put very forcibly. The answer to it is this: That where the fishing is carried on in the neighbourhood of a territory, that peculiar and special advantages accrue, from that fact to the subjects or citizens of the territory: they have a base of operation which foreigners have not; and foreigners resorting to those fisheries (speaking as a general rule), must come within the territorial jurisdiction of that particular Power for some purpose or the other connected with their pursuit of fishing; and, once they come within the limits of that territory, they thereupon become subject to the laws of that territory; and in this case you will see (and in some other cases to which I shall call attention), that the colonial Legislature or other legislative power, imposes, and within its constitutional rights imposes, certain conditions on those ships that come into its ports: for instance, that they shall not be allowed to go out before a certain day, or they shall not be allowed to go out unless they comply with this, that or the other condition; and thus it is that by means of the operation of local law, against all who come within the area of local law, plus the natural advantages which proximity to the fishing grounds presents, speaking generally, the fishery is more valuable to the subjects or citizens of the territory who are connected with it, than it is to those who being foreigners are
1144 not connected with it. The statute upon which they rely is set out at page 444 of the first volume of the Appendix to the Case

of the United States. I am not going to trouble you, Sir, by referring to it. I am contenting myself with the statement—(it is there to be examined by the Tribunal if they desire)—that it does not warrant the inference drawn from it by my friends.

Now the next illustration is the Greenland or Jan Mayen fisheries, and they are referred to on page 168 of the Argument of my friend. The paragraph is short and I will read it. It says:

The seal fisheries of Greenland were the subject of concurrent legislation in 1875, 1876, and 1877 by England, Norway, Sweden, Denmark, and Netherlands, which prohibits all fishing for seals by the inhabitants of those countries before April 3 in any year, within an area of the open sea bounded by the following parallels of latitude and longitude, viz., 67° N., 75° N., 5° E., 17° W.

The mere reading of that sentence ought to dispense with further comment. It shows that this legislation of a concurrent kind arrived at by these several Powers, each of them recognizing that it has no power outside territorial limits to bind other than its own subjects,—the subjects of each of these Powers resorting to these fisheries are however bound by the legislation of their own country; and inasmuch as by convention these Powers have agreed to legislate so as to bind their respective subjects, then these laws have an extra-territorial application to the subjects of England, Norway, Sweden, Denmark and the Netherlands.

The matter is explained, and clearly explained, on page 45 of the printed Argument of Great Britain:

The second group of enactments of other countries referred to in the United States Case are based upon Conventions; they therefore lend no support to the United States contention, that they can by their independent action claim to enforce such regulations against the subjects of other nations in respect of fishing in the high sea.

The enactments in question are those of Great Britain, Sweden, Norway, Russia, Germany, and Holland. They all deal with the Jan Mayen seal fisheries in the Atlantic east of Greenland; and proceed on the principle here enunciated.

The principle is at once explained by the section of the Act which I am going to read.

The first section of "The Great Britain Greenland Seal Fishery Act of 1875" is shortly as follows:

When it appears to Her Majesty in Council that the foreign States whose ships or subjects are engaged in the Jan Mayen fishery..... have made or will make with respect to their own ships and subjects the like provisions to those contained in this Act, it shall be lawful for Her Majesty, by Order in Council, to direct that this Act shall apply to the said seal fishery.

In other words, when the other nations have determined on their legislation, then the Queen, by Order in Council, can apply the provisions of the Act in question.

It then proceeds:

The legislation of the other countries is conceived in a similar spirit, and was passed after negotiations between their respective Governments.

The necessary legislation having been provided, the Queen, by Order in
1145 Council, dated the 28th November, 1876, put the Act in force against her own subjects.

The great difficulty of effectively maintaining a close time in distant fisheries in the high seas, and of protecting and regulating such fisheries, except as against subjects, has in many instances been dealt with by Conventions, as is stated in the United States Case.

These Conventions proceed on principles well established.

The principles are:

1. The determination of the limits of the exclusive fisheries of the respective parties to the Convention.

2. Except as expressly varied by agreement the respective national jurisdictions are preserved intact.

3. It is only by agreement that jurisdiction on the high sea over its nationals is given by one nation to another.

Because, you will observe that these conventions sometimes, not variably, but frequently give the right to the cruisers of one nation to ize, upon the high sea, the ships of a subject of another Power, a rty to the convention, which has offended against the provisions of e convention:

Then it goes on:

hese principles do not advance the United States contention. The consent of er nations is wanting to the exercise by the United States of the exclusive control ich it claims. The existence of the Conventions demonstrates their necessity; by h Conventions alone can one nation presume to control the subjects of another ite upon the high seas.

hey recognize the right of the subjects of all the contracting Parties alike to fish the high sea beyond the territorial waters, but for their mutual benefit they sub- t the fishing to regulations to be observed by the subjects of all alike. The Con- itions and the legislation giving effect to them do not profess to impose these gulations on the subjects of other countries, not parties to the Conventions, nor to hibit them in any way from fishing in the high seas, nor could they do so.

The next case is Russia, which is referred to on page 169 of the gument of the United States; and a statement that is made here, cessitates that I should go a little out of my way in this matter.

The statement in the Argument of the United States is this:

By the law of Russia, the whole business of the pursuit of seals in the White Sea d Caspian Sea, both as to time and manner, is regulated, and all killing of the ls except in pursuance of such regulations is prohibited.

Certain references are then made: and it proceeds:

The firm and resolute recent action of the Russian Government in prohibiting in open sea, near the Commander Islands, the same depredations upon the seal herd at are complained of by the United States in the present case, and in capturing Canadian vessels engaged in it, is well known and will be universally approved. at Great Britain, strong and fearless to defend her rights in every quarter of the be, will send a fleet into those waters to mount guard over the extermination of Russian seals by the slaughter of pregnant and nursing females, is not to be sonably expected. The world will see no war between Great Britain and Russia that score.

Well, it seems to me (although we know from the correspondence that have, that the representatives of the United States have been in mmunication with Russia)—that this is a mis-statement, as I hope to make clear, of Russian action and Russian pretensions on this 46 matter. First of all I wish to deal with the matter of Russian legislation and of Russian action; and we have got a very relia- means of judging of that by a correspondence entirely on the part those interested from the point of view of the United States, and I afraid, Sir, I must ask you to refer to one more book in this connec- n. It is Volume II of the Appendix to the British Case. The cor- spondence begins at the bottom of page 16 of Part II. You will see ere, Sir, a letter from Mr. Hoffman. Mr. Hoffman was, as I under- nd, the Representative at St. Petersburg, of the United States.

General FOSTER.—He was the Chargé d'Affaires.

Sir CHARLES RUSSELL.—The Chargé d'Affaires.

Now, this letter is sent to him from the Department of State, on the h of March, 1882.

IR: I enclose copies of letters from the Treasury, and a copy of a letter from ers. Lynde and Hough, of San Francisco, to the Secretary of the Treasury, touch- the Pacific coast fisheries. This latter communication states that, according to e news, "foreign vessels must receive an order from the Governor of Siberia, sides paying duties or 10 dollars per ton on all fish caught in Russian waters", ich they say would be ruinous to their business. In view of the above, I have to that you will make immediate enquiry on this subject, and report the facts. If rief telegram will furnish information of value to our fishermen in this regard, u can send one.

Then the enclosures are to be found on page 17. I will re second and third of those enclosures; the first I need not troub with, I think. The second is:

The subjoined Notice by the Russian Consul at Yokohama, that American are not allowed, without a special permit or licence from the Governor-Ge Eastern Siberia, "to carry on hunting, trading, fishing, etc., on the Russian or islands in the Okhotsk or Behring Seas, or on the north-eastern coast of within the sea-boundary line", is published by the Department for the info of American ship-masters interested.

Now, here is the third enclosure.

At the request of the local authorities of Behring and other Islands, the signed hereby notifies that the Russian Imperial Government publishes, for knowledge, the following.

(1) Without a special permit or licence from the Governor-General of Siberia, foreign vessels are not allowed to carry on trading, hunting, fishing, the Russian coast or islands in the Okhotsk and Behring Seas, or on the north coast of Asia, or within their sea-boundary line.

Mr. Justice HARLAN.—What line is that? What does he mea by the sea-boundary line?

Sir CHARLES RUSSELL.—The marine league from the shore. will see that presently, Sir, when I have developed the correspon

Then it proceeds:

(2) For such permits or licences, foreign vessels should apply to Vladi exclusively.

(3) In the port of Petropaulovsk, though being the only port of entry i tchatka, such permits or licenses shall not be issued.

1147 (4) No permits or licences whatever shall be issued for hunting, fis trading at or on the Commodore and Robben Islands.

Those are, you will recollect, specially seal islands. Then it go

(5) Foreign vessels found trading, fishing, hunting, etc., in Russian water out a licence or permit from the Governor-General, and also those possessing a or permit who may infringe the existing bye-laws on hunting, shall be conf both vessels and cargoes, for the benefit of the Government. This enactme be enforced henceforth, commencing with A. D. 1882.

(6) The enforcement of the above will be intrusted to Russian men-of-war, to Russian merchant-vessels, which, for that purpose, will carry military detac and be provided with proper instructions.

Then at page 18 follows a letter—the fifth enclosure—from I must read an extract before I read Mr. Hoffman's reply, in Messrs. Lynde and Hough state their position and their complai

Sir: You will please pardon us for this seeming intrusion, but the matter i we now seek your aid and assistance is of great import to us.

We now are and have been extensively engaged in the Pacific Coast Cod fi and, in fact, are among the very few who fifteen years ago started in a sm believing with energy and fair dealing we could work up an enterprise tha be a benefit to the coast. Our ideas were correct. We have been yearly vessels to the coast of Kamschatka (Sea of Okhotsk) for fish. We nev been molested in Russian waters from catching cod-fish or procuring bait are small salmon in the rivers, or filling fresh water for the use of ship, but it now there is a law which has never been enforced against foreigners, the s have recently noted, and which we have been apprised of, and the substance foreign vessels must receive an order from the Governor of Siberia, besides m a duty of 10 dollars per ton on all fish caught in Russian waters. This de sustained—

And so on.

Now this communication being made to Mr. Hoffman at St. Peters here is his answer. He says:

I have the honor to acknowledge the receipt of a Circular of the Treasury D ment of the 30th January last upon the subject of fishing, etc, in the Behring S in the Sea of Okhotsk.

I am able to give the Department some little information upon this subject, derived nearly four years ago from Mr. Charles H. Smith, for many years a resident of Vladivostok and at one time our Consul or Vice-Consul at that port.

A glance at the Map will show that the Kurile Islands are dotted across the entrance to the sea of Okhotsk the entire distance from Japan on the south to the southernmost cape of Kamtchatka on the north.

In the time when Russia owned the whole of these islands her Representatives in Siberia claimed that the Sea of Okhotsk was a *mare clausum*, for that Russian jurisdiction extended from island to island, and over 2 marine leagues of intermediate sea from Japan to Kamschatka.

But about five years ago Russia ceded the southern group of these islands to Japan in return for the half of the Island of Saghalien, which belonged to that power.

As soon as this was done it became impossible for the Siberian authorities to maintain their claim. My informant was not aware that this claim had ever been seriously made at St. Petersburgh.

The best whaling grounds are found in the bays and inlets of the Sea of Okhotsk.

Into these the Russian Government does not permit foreign whalers to enter, 1148 upon the ground that the entrance to them, from headland to headland, is less than 2 marine leagues wide. But while they permit no foreign whalers to penetrate into these bays, they avail themselves of their wealth very little. The whole privilege of whaling in those waters is a monopoly owned by an unimportant Company, which employs two or three sailing schooners only, the trying and other laborious work being done at their stations on shore.

Then apparently he inquires farther into the matter, and he says, in a letter dated March 27th 1882, page 19.

I have the honor to acknowledge the receipt of your No. 120, with its inclosures, in reference to our Pacific Ocean fisheries. Your despatch reached me yesterday, and to-day I have written to M. de Giers upon the subject, and I propose to call upon him upon his first reception day.

In the meantime, and until further information, I do not see that any new orders necessarily affecting our fishermen have been issued by the Russian Government. Messrs. Lynde and Hough have apparently given insufficient attention to the words "Russian waters". These waters are defined in the Notice published by the Imperial vice-consulate at Yokohama, as follows:

"Fishing etc., on the Russian coast or islands in the Okhotsk and Behring Seas, or on the north-eastern coast of Asia, or within their sea-boundary line."

If I recollect correctly the information given me by Mr. Smith upon this subject, referred to in my No. 44 of June 1878, and in my number 207 of this month, the cod banks lie in the open Sea of Okhotsk, many marine leagues off the south-western coast of Kamschatka. I observe that Messrs. Lynde and Hough state that their vessels fish from 10 to 25 miles from the shore. At that distance in an open sea they cannot be said "to fish upon the coast."

I do not think that Russia claims that the sea of Okhotsk is a *mare clausum*, over which she has exclusive jurisdiction. If she does her claim is not a tenable one since the cession of part of the group of the Kurile Islands to Japan, if it ever were tenable at any time.

I may add that, according to the information given me four years ago, Russia opposes no objection to foreign fishermen landing in desert places on the coast of Kamchatka, far from the few villages which are found on that coast, for the purposes of catching bait and procuring fresh water; but she does object to all communication between trading and fishing vessels and the inhabitants, alleging that these vessels sell them whiskey upon which they get drunk, and neglect their fishing, their only means of livelihood, and then, with their wives and children, die of starvation the ensuing winter.

Then there comes a further note from the same gentleman in these terms. In the first paragraph he says:

I have the honor to forward to you herewith a translation of a note recently received from M. de Giers upon the subject of hunting, fishing, and trading in the Pacific waters.

I do not see that there is anything in the Regulations referred to that affects our whalers, nor our cod fisheries either, except that when they go ashore to catch small fish for bait in the streams, they expose themselves to interruption from the Russian authorities, who, finding them in territorial waters, may accuse them of having taken their fish therein.

Then M. de Giers' letter follows. It is in these words:

Referring to the exchange of communications which has taken place between us on the subject of a Notice published by our Consul at Yokohama relative to

1149 fishing, hunting, and to trade, in the Russian waters of the Pacific, and in reply to the note which you addressed to me, dated the 15th (27th) March, I am now in a position to give you the following information.

A Notice of the tenour of that annexed to your note of the 15th March was, in fact, published by our Consul at Yokohama, and our Consul-General at San Francisco is also authorized to publish it.

This measure refers only to prohibited industries and to the trade in contraband; the restrictions which it establishes extend strictly to the territorial waters of Russia only. It was required by the numerous abuses proved in late years, and which fell with all their weight on the population of our sea shore and of our islands, whose only means of support is by fishing and hunting. These abuses inflicted also a marked injury on the interests of the Company to which the Imperial Government had conceded the monopoly of fishing and hunting ("exportation") in islands called the "Commodore" and the "Seals".

Beyond the new Regulation, of which the essential point is the obligation imposed upon captains of vessels who desire to fish and to hunt in the Russian waters of the Pacific to provide themselves at Vladivostock with the permission or licence of the Governor-General of Oriental Siberia, the right of fishing, hunting, and of trade by foreigners in our territorial waters is regulated by Article 560 and those following of Vol. XII, Part II, of the Code of Laws.

Now, Sir, if you look to the bottom of that page headed "Inclosure 2", you will see the Articles.

ARTICLE 560. The maritime waters, even when they wash the shores where there is a permanent population, cannot be the subject of private possession; they are open to the use of one and all.

ART. 561. No exception will be made to this general rule, except under the form of special privileges granted for the right of fishing in certain fixed localities and during limited periods.

ART. 562. The above Regulation regarding the right of fishing and analogous occupations on the seas extends equally to all lakes which do not belong to private properties.

ART. 565. No restrictions shall be established as regards the apparatus (engines) employed for fishing and for analogous operations in the high seas, and it shall be permitted to every one to use for this purpose such apparatus as he shall judge to be best according to the circumstances of the locality.

ART. 571. Ships in quarantine are not permitted to fish. The same prohibition extends in general to all persons in those localities where ships are lying undergoing quarantine.

Now you see, Sir, that this correspondence is between two Government Departments of the United States. My friends had access to this even more readily than we had access to it. There it is; and you will now see how far they are founded in the observations they make in their case on this subject.

Now I conclude the matter by asking your attention to page 22 of the same volume. The correspondence I have been reading, up to the present time, you will observe, Sir, relates to the year 1882.

Now on page 22 is a later letter in 1887, from Mr. Lothrop who was I think—General Foster will correct me if I am wrong—then the Chargé d'Affaires?

General FOSTER.—He was the Minister.

Sir CHARLES RUSSELL.—He was then Minister of the United
1150 States at St.-Petersburg. He says, writing to Mr. Bayard who was, as you will recollect, Sir, Secretary of State at that time:

I have the honour to transmit to you a translation of a communication received from the Imperial Foreign Office on the 1st February instant, relative to the seizure of the schooner "Eliza".

The Russian Government claims that she was seized and condemned under the provisions of an Order, or Regulation, which took effect at the beginning of 1882, and which absolutely prohibited every kind of trading, hunting, and fishing on the Russian Pacific coast without a special licence from the Governor-General.

It is not claimed that the "Eliza" was engaged in seal-fishing, but that she was found actually engaged in trading with the natives with the contraband articles of arms and strong liquors.

She was condemned by a Commission sitting on the Imperial corvette "Rasboïnik", composed of the officers thereof. In this respect, the case, is precisely like that of the "Henrietta", mentioned in my last preceding dispatch N° 95, and of this date.

It will be noticed that Mr. Spooner, the owner of the "Eliza", in his statement of his claim, declares that the "Eliza" was on a trading voyage, engaged in bartering with the natives, and catching walrus, and as such did not come under the Notice of the Russian Government, which was directed against the capture of seals on Copper, Robbins, and Behring Islands.

It will be seen that Mr. Spooner either refers to an Order of the Russian Government different from the one mentioned by the Imperial Foreign Office, or he understood the letter in a very different sense.

I may add that the Russian Code of Prize Law of 1869, Article 21, and now in force, limits the jurisdictional waters of Russia to 3 miles from the shore.

I think that is all.

The communication from General Vlangaly to Mr. Lothrop appears to corroborate the statement of Mr. Lothrop, that it was not a question of fishing, but a question of the "Eliza" being engaged in an illicit trade.

The second part of that letter is to this effect:

This information is in substance to the effect that the "Eliza" was confiscated not for the fact of seal hunting, but by virtue of an Administrative Regulation prohibiting, from the beginning of the year 1882, every kind of commercial act, of hunting, and of fishing on our coasts of the Pacific, without a special authorization from the Governor-General, and carrying with it, against those disregarding it, the penalty of the seizure of the ship as well as of the cargo.

Then a little lower down he says:

The crew of the "Eliza" was engaged not only hunting walrus on our coast of Kamschatka, and in commercial transactions with the natives, but traded there with illicit articles such as arms and strong liquors.

I think it will also be found that at a later stage, although emulating to some extent, but a little way behind the United States, some seizures have been made by Russia; it will be found that they allege that those seizures were made within territorial waters and that they required the captains seized to sign statements that in point of fact they were illegally engaged within the limits of the territorial waters; but this is a matter with respect to which I do not wish at present to be diverted. I think you will see, Sir, that I have answered satisfactorily the point which is made here.

1151 Marquis VENOSTA.—Do you not think that the Russian Government has perhaps considered the Gulf of Mesensk as a gulf, the waters of which are territorial waters? I do not know, I ask you.

Sir CHARLES RUSSELL.—That I am just coming to Sir.

Marquis VENOSTA.—Because a nation may recognize the general rule of the cannon-shot on the open sea, and may have some peculiar claim, more or less plausible, in regard to a gulf.

Sir CHARLES RUSSELL.—I am just coming to that: it is the next item of that argument. At the bottom of page 46 it says:

The Russian law dealing with the Ustinsk sealing industry in the White Sea is set out in the United States case.

The industry is carried on in the Gulf of Mesensk in the White Sea; the gulf is 53 miles wide.

The principal provisions of the law are the appointing certain days of departure to the fisheries, and prohibiting the lighting of fires to windward of the groups or hauling-grounds of the seals.

The law is not directly or indirectly applied to foreigners.

In this law again, you see an example of the control that possession of territory gives over foreigners if they come within the sphere of its

operation, as they may be obliged to do; they are controlled by the local law regulating days of departure, or other conditions of departure; and it may further be, as Count Venosta has been good enough to suggest, that Russia may think that it has a claim to the Gulf of Mesensk upon another and different ground as being a gulf largely enclosed by territory. But it does not seem to me necessary to consider that: and both Governments recognize, that what Marquis Venosta has been good enough to suggest is possible.

I have already dealt with Behring Sea, and the Sea of Okhotsk, on page 47.

Then as regards the Caspian Sea, at the bottom of page 47 of the British Argument, it is said:

> The fishing and sealing industries in the Caspian Sea are also dealt with by law, which expressly declares that the catching of fish and killing of seals in the waters of the Caspian included in the Russian Empire are free to all who desire to engage in the same, except in certain specified localities, under observance of the established rules. A close time is appointed.

Of course the Caspian Sea stands in an entirely different category from any we have been discussing. The Caspian is a land-locked sea included within the territorial dominions of Russia and Persia, and I need not say that that being the fact, those Powers have absolutely the right to exclude all whom they please from access to those territories, because the access can only be obtained, in the one case through Russian, and in the other case through Persian territory: because it is an admitted right of sovereignty to deny access through their territory to any person they please.

Senator MORGAN.—Do you know, Sir Charles, whether Persia has coincided with Russia in its enactments?

1152 Sir CHARLES RUSSELL.—I am unable to say, Sir; and it is enough to say that one need only look at the map to see that the Caspian Sea is entirely surrounded by land—Persian on the one side and Russian on the other—but the case affords no aid to this Tribunal at all on the question we are discussing, and presents no analogy.

Now the next case is that of Uruguay; and as to this, I have to say that although this is referred to in the Case of the United States, it is answered in the British Counter Case at page 90, and after that answer has been given, it is not thereafter adverted to in the printed Argument of the United States; and therefore I content myself with saying that the answer has been given in the British Counter-Case, and to this there has been no rejoinder.

The statement is this. It is, in effect, the statement at page 48 of the British Argument:

> The laws of Uruguay which regulate the taking of seals upon the Lobos Islands do not extend beyond the ordinary territorial jurisdiction, and have no application to pelagic sealing beyond that limit. Seals are taken on the islands, and the State—

this is part of the enactment

> does not permit vessels of any kind to anchor off any of the said islands, and does not allow any works to be constructed that might frighten the seals away.

That is the whole story.

So as to Chile; that is referred to in the Case of the United States, but is not reproduced in the Argument of my learned friend.

Mr. PHELPS.—At the bottom of page 168, in the Argument, you will find a reference to Uruguay.

Sir CHARLES RUSSELL.—I beg your pardon; that is so. I had omitted) notice it.

Under the law of Uruguay the killing of seals on the Lobos and other islands "in ıat part of the ocean adjacent to the departments of Maldonado and Rocha" is cured to contractors, who pay to the Government a license fee and duty.

If that is all that my learned friend has to say about it, I am content) take it, it is not a thing that demands an answer.

Then Chile is mentioned in the Case; I will read what we say about at page 90 of our Counter Case. We set out what is said in the nited States Case thus:

The United States Case says:

The Governments of Chile and the Argentine Republic have also recently given rotection to the fur-seals resorting to their coasts in the hope of restoring their most exterminated rookeries.

The mischief, however, appears to have been entirely done by sealers landing on ıe rookeries. Mr. Comer states that.

If there had been strict regulations enforced, allowing us to kill only young "wigs", nd not to disturb the breeding seals, I am convinced, and have no doubt, that all hese rookeries would be full of seals to-day.

The Chilean law referred to appears to be the Ordinance of the 17th August, 1892, from which the following extracts are made in order to show that the
153 Chilean Government asserts no jurisdiction beyond the ordinary 3-mile limit, but is careful to define strictly the limits of the operation of the Ordinance.

Then the Ordinance is set out.

"*Ordinance regulating the Pursuit at Sea or on Land of Seals or Sea-wolves, Otters and 'Chungungos' in the Coasts, Islands, and Territorial Waters of Chile.*

"ARTICLE 1. Only Chileans and foreigners domiciled in Chile are allowed to engage in the pursuit on land or at sea of seals or sea-wolves, otters, and 'chungungos' *in the coasts, islands, and territorial waters* of the Republic, as laid down in Article 611 of the Civil Code.

"No ships can engage in the pursuit to which this Ordinance refers except those Chilean vessels which are in possession of the qualifications required by the Navigation Laws to be considered as such, foreign vessels being absolutely prohibited from engaging in this industry.

"ART. 2. For the purposes of this Ordinance, *the coasts, islands, and territorial waters* of Chile shall be considered as divided into as many zones as there are Maritime Governments in the Republic.

"*The extent of each zone shall be that of the respective Maritime Government.*"

Then it proceeds:

Acting under powers conferred by the above Ordinance, the President of the Republic on the 20th August, 1892, decreed that the fishery of seals

"be suspended for the period of one year in the regions included in the Maritime Governments of Chiloe and Magellanes, and on the coasts of the Islands of Juan Fernandez."

The general law of Chile as to fisheries is contained in the Civil Code, where it is nacted:

ARTICLE 585.

And I would beg to compliment Chile upon its very accurate statement of what I conceive to be the law recognized by nations in this matter.

ıings which in their nature are common property, as the product of the high seas, e not subject to any dominion, and no nation, corporation, or individual has any ght to monopolize them. The use or enjoyment of them is determined among the tizens of any one nation by the laws of that nation, but between different nations r international law.

"ARTICLE 593. The adjacent sea, to a distance of 1 marine league, measured from w-water mark, is the territorial sea, and under the national dominion; but police ıministration for the purposes of the security of the State or the carrying out of ıcal Regulations, extends to a distance of 4 marine leagues, measured in the same anner."

The 4 marine leagues for the two purposes mentioned I do not admit; nor for the latter purpose, without the qualification which I have more than once given.

"ARTICLE 611. Sea fishing is free, but in the territorial seas the right of fishing is enjoyed only by Chilean citizens or domiciled foreigners."

Now the next case given is the Argentine Republic and that was mentioned in the Case, but is not again mentioned I think I only need read what is said in the British Argument, p. 48.

"The laws of the Republic are not set out in the United States Appendix. The statement in the United States Case is merely that protection is given to the fur-seals resorting to the coasts; it is not stated that the regulations are extra-territorial, or that they apply to foreigners."

1154 The next case is Japan. This also appeared in the United States Case, but it does not appear in the Argument. It is dealt with at page 92 of the British Counter Case.

It is also stated that "the Japanese Government has taken steps toward the restoration and preservation of the fur-seals at the Kurile Islands". The extract from Regulations of 1885 referred to by way of verification, and set forth in the Appendix, relates to islands within the territory of Japan, and no other law is set forth or mentioned; nor is it alleged in the Case that any of the Japanese laws relating to seal fisheries have an exterritorial operation. Further, the Regulations of 1885 do not appear to be now in force, for the full official Memorandum supplied on the 14th December, 1891, by the courtesy of the Japanese Government, in answer to a circular asking for "copies of any printed documents or Reports referring to the fur-seal fisheries" sets forth "the several Regulations in force at the present time", among which those of 1885 are not given; and it states that there are no means of checking "foreign poachers" "outside the line of territorial limit fixed by international law."

Now, so far, I think I have dealt with every case cited on this point: and on page 49 of our Argument is stated the conclusion to which I think the Tribunal is justified in coming upon an examination in detail of these instances.

None of the countries above specified profess to control the killing of seals by extra-territorial provisions, or by interfering with foreigners on the high seas, or in any other way than in accordance with the principles already established; nor do they profess to claim a property in or a right of protection of seals in the high sea.

The first contention of the United States, that seal life is protected by extra-territorial laws of other countries applicable to foreigners, is therefore shown to be without foundation.

I now come to the next branch of this argument.

A further contention of the United States is that, not seal-fisheries only, but other fisheries, are protected by extra-territorial laws of other nations, and that they are extended to foreigners.

Then there are the Irish oyster fisheries, the Scotch herring fisheries, the Ceylon pearl fisheries, the Queensland and West Australian fisheries, which may be called British examples: and the foreign examples are France, Algeria, Italy, Norwegian, Columbia, and Mexico. These I will examine in order.

The subject of the Irish oyster fisheries which comes first in order is referred to on page 166 of the United States Argument. It says:

Oyster beds in the open sea have been made the subject of similar legislation in Great Britain.

A section of the British "Sea Fisheries Act, 1868", conferred upon the Crown the right by orders in council to restrict and regulate dredging for oysters on any oyster bed within *twenty* miles of a straight line drawn between two specified points on the coast of Ireland, "outside of the exclusive fishery limits of the British Isles." The act extends to all boats specified in the order, whether British or foreign.

Now so far (and I should like the Tribunal to follow this a little closely) it states, and states correctly, that this British "Sea Fisheries Act

8", which *prima facie* applies only to subjects of the Crown, and not to foreigners, gives to the Crown the right, by Order in Coun-
5 cil, to specify boats, whether British or foreign, and so bring them within the operation of the Act. Now I call attention to
it the actual state of the case is, and to the further fact that no such
er has been ever made to include any foreign boats, and that there
never been any assertion of power under this Act as against any
igner whatever.

might, but for the way in which it has been referred to, dismiss it
lightly, because at page 93 in our Counter Case, relating to this
ter, we make this statement:

to Ireland, the British Government have never assumed to put in force against
gners any bye-laws made under "The Seal Fisheries Act, 1868," affecting waters
de territorial limits. And although this Act is relied on in the United States
as authorizing the assertion of jurisdiction over foreigners outside those limits,
ye-law having that effect exists, and it would be contrary to the practice of the
sh Government that any such bye-laws should be made, unless in pursuance of
Treaty with the Power whose subjects may be affected.

ow that is a statement of fact my learned friend, when he came to
are his Argument did not meet, and could not meet, and it ought
e quite enough for the purpose of this discussion.

ut the matter is gone into fully in the British Argument at page 50.

e Statute permits the Irish Fishery Commissioners to regulate, by bye-laws,
r dredging on banks 20 miles to seaward of a certain line drawn between two
lands on the east coast of Ireland.
ithin this line the extreme depth of indentation is not more than 5 miles.
e Act provides that the bye-laws are to apply equally to all boats and persons
hom they may be binding; but they are not to come into operation until an
r in Council so directs.
e Order in Council is to be binding on all British sea-fishing boats, and on any
r sea-fishing boats specified in the Orders.

herefore, till there is an Order specifying any except British sea
ing boats, it has, and can have, no application to any other.

e facts which have occurred since the passing of the Statute are as follows:
e Commissioners have made a bye-law appointing a close time.
e bye-law was put in force by Order in Council of the 29th April, 1869.
e Order recited the power given to the Queen by the Act to specify other besides
ish boats to which the bye-law was to apply.
other boats were so specified.
e law is therefore expressly limited to British boats within the 20 miles. It
ot by the terms of the Act itself apply to any foreign boats.
would be contrary to the principles on which British legislation invariably pro-
s that bye-laws should apply to foreign boats outside the 3-mile limit, unless
er to enforce such a bye-law against the boats of any nation had been acquired
reaty.
e provision was inserted in the Act to provide for the case of any such Treaty
g entered into.
ereafter, without such enabling provision in the Act, the Queen would possess
ower to make an order in Council bringing foreigners within the Act.
e statement made in the United States Case is therefore inaccurate.

ou see therefore the object of the assertion of that power: because,
Treaty should be made with any other State that might be inter-
ested in this fishery, the Queen would have had no jurisdiction
to apply it to persons outside the three-mile limit other than her
own subjects, unless the Statute gave her express power so to do.

ow the next case referred to is the Scotch Herring Fishery; and
isely the same thing may be said of this:

the Act of 1887, 52 and 53 Vict, cap. 23, a close time is provided, and trawling
ohibited within the north eastern indentation of the coast of Scotland; the line
mit is drawn from Duncansby Head, in Caithness, to Rattray Point, in Aber-
shire, a distance of 80 miles.

Penalties are imposed on any person infringing the provisions of the Act.

Stress is laid in the United States Case on the words "any person;" and the sta ment is made that "the Act is not confined in its operations to British subjects."

This statement is at variance with the principles of English legislation and practice of the English Courts in interpreting Statutes.

"Any person" is a term commonly used in English Statutes dealing with offenc and it is invariably applied to such persons only as owe a duty of obedience to British Parliament.

That is to say, so far as their extra-territorial application is co cerned. But I cannot help thinking that with regard to all this cl of cases, it helps the Tribunal very, very little, if at all; because, su posing it were to be made clear that there was a case in which a Leg lature had affected to bind foreigners outside territorial limits, that either a good law or a bad law. It does not make it international l because a particular Power has affected to usurp a power which int national law does not warrant it in assuming. I shall later have call attention to cases illustrating this principle of the construction British Statutes which I have been referring to, namely, that if t words of a Statute are general in its application to all persons, the u form rule of construction is that, extra-territorially, it applies only those who are subject to the laws of Great Britain.

Now, the next case cited is the Ceylon Pearl Fishery, and I may s in passing that this is a subject which may be referred to under a d ferent head of claim. The erudition of the members of the Tribun may be possibly able to supplement my scant information on the su ject, but, as far as I know, these fisheries of Ceylon and Bahrem sta in a position perfectly unique. How old they are, I do not kno Some of my learned friends have said that they are old enough to mentioned in Herodotus. I do not know how the fact is, I have n been able to verify it; but these facts are undoubted that for ma generations the owners of the territory of Ceylon have, with the acq escence of all other Powers of the World, been allowed to claim exercise dominion in respect of these Fisheries which are contiguous the coast but which extend beyond the three miles of the territor zone or belt. Those facts are undoubted, and I care not whether t title is without a flaw; it is a title which has been recognised for a gr many years; has been acquiesced in; and as to which, as far as I kno no dispute has ever occurred. There is also the consideration whet this case may not be referable to a different consideration; it may, p sibly be founded upon exclusive possession, from their contigu
1157 to the shore and from the manner in which the fisheries are the selves carried on. My learned friend Mr. Carter was very po erful in relation to the suggestion that the claim to the Ceylon Fisher was defended upon the ground that you could occupy portions of t sea away from the land; and he then proceeded to say that, if that w so, then all that a Nation had to do was to discover where there wa valuable feeding bank for some valuable race of fish, and buoy it o where you could get a bottom sufficient at all events, to plant yo leads upon the ground,—to buoy out 100 square miles, or 200 squa miles, leave the buoys, and say "That is our territory."

I must ask the Tribunal, is that an argument which is to be treat seriously? Is there any analogy between that case and the occupati of a very small portion of the bottom of the sea contiguous to admitt territory, and the pursuit there of this particular fishing? I submit th the analogy does not exist, and the illustration is one that is ve strained. There is undoubtedly some warrant for the distinction betwe the case of these fisheries, whether they are pearl, or whether they a

l, or whether they are oyster, and there is an obvious distinction in , between a fishery of that description and one which depends on pursuit of any free-swimming fish in the Ocean. Chief Justice kburn, in that case of the *Queen* v. *Keyn*, which has been so often rred to, says that a portion of the bed of the sea, where it can be sically, permanently occupied, may be subject to occupation in the e manner as unoccupied territory; Vattel also is cited upon page 52 ur Argument, he says:

o can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become erty?

r. Justice HARLAN.—Where is Chief Justice Cockburn's judgment rted?

r CHARLES RUSSELL.—It is in the Law Reports, 2 Exchequer ision, at page 63. I can lend any of the Tribunal the book if they re it.

r. Justice HARLAN.—Yes, I should like to see it.

r CHARLES RUSSELL.—I may have to refer to it a little later. nust refer now to the Australian Pearl Fisheries as another instance clear misunderstanding on the part of my learned friends. On 52 of our Argument we state that—

the United States Case reference is thus made to the Australian fishery laws: hese Statutes extended the local regulations of the two countries mentioned ensland and Western Australia) to defined areas of the open sea of which the remote points are about 250 miles from the coast of Queensland and about 600 from the coast of Western Australia".

uffices to point out that these statutes are in express terms confined to British and boats attached to British ships.

e reference is to page 233 of the United States Case. This is the age:

pearl fisheries of Queensland and Western Australia were, in the years 1888 and 1889, made the subject of regulation by two statutes enacted by the Federal Council of Australasia. These statutes extended the local regulations of the two countries mentioned to defined areas of the open sea, of which the remote points are about two hundred and fifty miles from the coast of Queensand about six hundred miles from the coast of western Australia.

eneral FOSTER.—We go on to say that they are confined to British ects.

r CHARLES RUSSELL.—Yes that is just what I am going to read:

se acts are, by their terms limited in their operations to British subjects,

nd therefore of course have nothing to do with the case,)

s Sir George Baden-Powell has pointed out, in a recent address delivered before ssociation for the Codification of the Law of Nations, the remoteness of these s renders it practically impossible for foreign vessels to participate in the pearl ies without entering an Australian port, and thereby rendering themselves able to Australian law.

ite so, that is what I have been saying, and why that should have cited I do not know.

en the next case is the law of France as to which the Tribunal the best means within their reach of informing themselves if we ot explain it correctly. France is referred to at page 165 of the ed States Argument thus:

islation of the same character has also taken place in France and Italy in nce to coral reefs in the open sea and outside the jurisdictional limits.

French law of 1864 relating to the coral fisheries of Algeria and Tunis required hermen to take out licenses to fish anywhere on the coral banks, which extend the Mediterranean 7 *miles* from shore. In addition to this license all foreign

fishermen were required to take out patents from the Government, for which a considerable sum had to be paid; and by the recent act of 1888, foreign fishermen are precluded entirely from fishing within 3 miles from shore, apparently leaving the former regulations in force with respect to such portions of the coral banks as lie outside of those limits.

Now we have dealt with the whole of the French legislation which they mentioned in their original case, but when my learned friend comes to his Argument the only point which is made relates to the case of Algeria and Tunis, and I think I must trouble the Tribunal with a short reference to what we say about this subject at page 94 of the British Counter Case.

The United States Case says that the Decree of the 10th May 1862.—
"went so far as to provide in terms that under certain circumstances fishing might be prohibited over areas of the sea beyond 3 miles from shore".

This Decree, of which Article 2 only is set forth in the Appendix to the United States Case, is given at length in the Appendix to this Counter-Case. Article I has the following paragraph:

Les pêcheurs sont tenus d'observer, dans les mers situées entre les côtes de France et celle du Royaume-Uni de la Grande-Bretagne et d'Irlande, les prescriptions de la Convention du 2 août 1839, et du Règlement International du 23 juin 1843.

This shows that French subjects only are affected; for the Government did, and could bind its subjects only by the Convention of 1839.

Article 2 is as follows:

Sur la demande des prud'hommes—

The PRESIDENT.—A prud'homme is a sort of Alderman.

1159 Sir CHARLES RUSSELL.—

Sur la demande des prud'hommes des pêcheurs, de leurs délégués et, à défaut, des syndics des gens de mer, certaines pêches peuvent être temporairement interdites sur une étendue de mer au delà de 3 milles du littoral, si cette mesure est commandée par l'intérêt de la conservation des fonds ou de la pêche de poissons de passage.

That is "free swimming fish."

The PRESIDENT.—Yes.

Sir CHARLES RUSSELL.—

L'Arrêté d'interdiction est pris par le Préfet Maritime.

Then our Counter Case continues:

It is not alleged in the United States Case that the power thus given has been acted on as against foreigners, and it is submitted that Article 2 was not intended to authorize bye-laws affecting foreigners beyond territorial limits.

The construction which supposes the Decree to apply to foreigners assumes it to assert an authority to prohibit fishing to all nations, unlimited in the selection of the kinds of fish to which the prohibition may apply, either as to their being "located" near French coasts, or as to their being those in which France has "an interest, an industry and a commerce" and assumes that the prohibition may extend to mere "fishes of passage" in which the interest of France is only that which it has in common with other nations, and may apply to every part of the high seas.

I omit the intervening passage: it then proceeds:

The extent to which France claims to legislate for foreign fishermen is now regulated by the Law of the 1st March 1888.

Article 1 says:

"La pêche est interdite aux bateaux étrangers dans les eaux territoriales de la France et de l'Algérie, en deçà d'une limite qui est fixée à 3 milles marins au large de la basse mer."

The United States Case proceeds:

"Numerous laws have also been enacted by France to protect and regulate the coral fisheries of Algeria, both as to natives and foreigners, and the coral beds so regulated extend at some points as far as 7 miles into the sea."

This is not verified by particulars or evidence.

If that answer is in any way incomplete, I would ask you to be good enough, Sir, to inform your colleagues what it may be necessary to know further about it.

'he next case is that of the Algerian Coral Fisheries, which I have eady dealt with as part of France.

'he next is the Italian Coral Fisheries, referred to on page 53 of our gument; and I will content myself with reading the observation ich the Marquis Venosta was good enough to make in the course of learned friend Mr. Coudert's argument. It will be found at page 570 the print.

will say in regard to the observation of Mr. Coudert that the Italian Decrees do apply to foreigners. The three Decrees cited in the Case of the United States an addition to the Regulation of November 13th, 1882, which is made to apply law of March 4th, 1877, on fishing, and this law in its 1st article as well as the gulations limits their zone of application to the territorial waters. The coral Banks of Sciacca where fishery was forbidden for some time, are outside the ter-) ritorial waters; so those Decrees were not applicable to foreigners if they went there; but the industry, in fact, is exclusively carried on by Italian citizens. nst add however that this prohibition has now been repealed.

Ir. COUDERT.—Yes, I was coming to that question,—the distinction between citi- s and foreigners, and the privilege that the rule would give to foreigners over zens. Of course, if as the Arbitrator says, and I desire to be instructed by him. larquis VISCONTI-VENOSTA.—It is a question of fact.

Marquis VISCONTI-VENOSTA.—The question of fact is that this does t apply to foreigners.

Sir CHARLES RUSSELL.—Then we have next the Norwegian Whale sheries, which are mentioned in the Case of the United States, but t referred to in the Argument of my learned friend, Mr. Phelps. We ve, at page 96 of our Counter Case, dealt with that matter.

s to Norway, the United States Case says that the principle of contention (3)

the United States as set out at page 74, which I will refer to in a ment

ecognized in a Statute for the protection of whales, "in Varanger Fiord, an arm the open sea about 32 marine miles in width." There is nothing in the Norwegian 's set forth in the Appendix to the United States Case to show that they apply to eigners at all. If they do, then, as regards Varanger Fiord, the question may be ether or not it belongs to the "inner waters" of Norway.

Mr. GRAM.—I should only wish to say it is quite true there is nothing the Norwegian Law which expressly shows that it is intended to ply to foreigners; but, as a matter of fact, it is directed against eigners as well as against Norwegian citizens,—the Fiords are nsidered to be interior waters as a rule.

Sir CHARLES RUSSELL.—Yes. As a matter of fact, I believe, I am ht in saying that no question has ever arisen as to the necessity of plying as against foreigners any principle of exclusion.

Mr. GRAM.—I beg your pardon. Norway has applied the principle ainst foreign subjects in that part of the country.

Sir CHARLES RUSSELL.—I was not aware of that. Perhaps you will good enough, sir, to tell the Arbitrators the result of the contention.

Mr. GRAM.—It has always been maintained that the Fiords are inner ters against foreigners as well as against Norwegians.

Sir CHARLES RUSSELL.—The statement in the Argument is that if law applies to foreigners, and is put in force against foreigners, then regards the Varanger Fiord, the question is whether it does or does belong to the inner waters of Norway or fall within the principle of d-locked waters.

Lord HANNEN.—And it turns entirely on that, Sir Charles. The estion is solely whether these are interior waters.

Senator MORGAN.—What is the width of these interior waters, or rds?

Sir CHARLES RUSSELL.—I have just read it, Sir. It is 32 miles.

1161 Senator MORGAN.—That must be a good way from the three mile limit, somewhere.

Sir CHARLES RUSSELL.—Yes.

Senator MORGAN.—It is the Norwegian construction of the three mile limit.

Mr. GRAM.—The distance is calculated from the mouth of the fiords.

Sir CHARLES RUSSELL.—I think I may remind Senator Morgan that there are bays on the American coast—Delaware Bay for instance—which have been claimed by the United States as coming within that principle of inner waters, land-locked waters, although they are wider at the mouth than Varanger Fiord.

Senator MORGAN.—I know of no case in which that question has been brought up between the United States and any foreign Government.

Sir CHARLES RUSSELL.—That is another matter. I was merely suggesting that; and I think Senator Morgan will admit the impeachment.

The PRESIDENT.—This all shows that we must be extremely prudent. We will not attempt to define what is meant by territorial waters; and I believe indeed that question is not before us.

Lord HANNEN.—I think, Sir Charles, you will find it was brought up with reference to the Bay of Fundy, before an Arbitration of which I have some knowledge; and it was decided that the Bay of Fundy could not be claimed by England. The United States disputed it.

Senator MORGAN.—Because there is an American island in the Bay of Fundy.

Sir CHARLES RUSSELL.—However, as the learned President has said, it does not touch this question, because it is not put as an extension of jurisdiction beyond the three mile limit; but it is based upon the assertion, right or wrong, that it is inner or land-locked waters of the territory. Whether that contention is right or wrong, it is not necessary to consider. The illustration, whatever the case is, does not help the argument put forward.

The next reference, Sir, is to Panama, which is referred to on page 165 of the Argument of the United States, where my friend says:

> Similar restrictions upon the pearl fisheries in the open sea have been likewise interposed by the Government of Colombia.
>
> A decree by the governor of Panama in the United States of Colombia, in 1890, prohibited the use of diving machines for the collection of pearls within a section of the Gulf of Panama, which is between 60 and 70 marine miles in width, and of which the most remote point is 30 marine miles from the main land.

From the map which is referred to and set out at page 484 of the First Volume of the Appendix to the Case of the United States, it would appear that there are two gulfs in the Bay of Panama, and not one as might be gathered from the above statement, and that both, or at least one of them, may fall within the principle of embayed waters.

Our comment upon this matter at page 96 of the Counter Case is this:

1162 The law of Panama next referred to applies, and is alleged to apply, only to pearl fisheries as to the title or want of title to which, or their proximity to islands or coast, or whether in inland waters, nothing is said. Nor is there anything to show that the law in question applies to foreigners.

The assertion in the United States Case as to the area affected by the law is unsupported by evidence; and it will be observed that the Map of the Panama pearl fisheries in the Appendix, does not purport to come from the Panama Government, but to be "prepared at the office of the Coast and Geodetic Survey". From what materials it was so prepared is not explained; and as it refers to a Decree of 1890, and is not dated, it may be supposed to have been made for exhibition to the Tribunal of Arbitration.

No doubt the map is honestly enough made for the purposes for which it is intended; but it is not an official map, and it does not supply data which would enable one to judge of the exact weight to be attached to it.

The Tribunal here adjourned for a short time.

Sir CHARLES RUSSELL.—Mr. President, I am glad to say that, in reference to that matter of the legislation in relation to the purse seine and mackerel fishery, my friends Mr. Tupper and Mr. Foster are both right. Mr. Foster is right in saying that the convention entered into is general. My friend Mr. Tupper is right in saying that the occasion of its being entered into was in relation to the purse seine. It stands thus: That on the 22nd of May, 1890 the Canadian Government asked that the United States Government might be communicated with, with a view of obtaining some international legislation, either for the purpose of prohibition or of restriction of the use of the purse seine in the mackerel fishery, in order that, for the general good, the impending danger to this valuable industry might be averted.

That was the subject for discussion; and ultimately the Convention entered into resulted in an arrangement for the appointment of a commission to consider and report concerning the regulations, practice and restrictions proper to be adopted in concert, with regard to, among other things:

The limitation or prevention of exhaustive or destructive methods of taking fish and shell-fish in the territorial and contiguous waters of the United States and Her Majesty's possessions in North America respectively, and also in the waters of the open seas *outside the territorial limits* of either country to which the inhabitants of the respective countries may habitually resort for the purpose of such fishing.

It was therefore made by Convention a matter which was, when it came to any further head, to be given effect to by legislation by either country so as to bind its own nationals.

Senator MORGAN.—That process of purse seine fishing, Sir Charles, allow me to say, was the invention of the people of the United States and was practised by them; and both the Government of the United States and the Government of Canada thought it ought to be given up.

Sir CHARLES RUSSELL.—I presume, Sir, like many other inventions of the United States it was used by others than the people of the United States—that it was used by both Canadian and United States fishermen.

1163 Senator MORGAN.—It was commonly used by both; yes.

Sir CHARLES RUSSELL.—Now, sir, I left off at page 54 of the British Argument; and the only one of these cases of fishery remaining is the Mexican Pearl Fisheries. That was referred to in the United States Case, but is not referred to in their Argument. I will content myself therefore with reading from page 96 of the British Counter Case, which states what the facts are, which are not contradicted.

The facts stated with reference to these pearl fisheries are not verified by evidence. The Mexican Regulations appear only to refer to "the waters of the Republic;" and even then foreigners are admitted to the fisheries on complying with certain Regulations as to registration and payment of tonnage and lighthouse dues.

It is worth observing that, although Mexican legislation is adduced in the United States Case as an example of the exercise of jurisdiction outside the 3-mile limit, yet in setting out the Regulations of 1874 in the Appendix, those relating to the boundaries of the fishing districts are omitted.

As showing that Great Britain has not consented to the exercise of fishery jurisdiction by Mexico beyond the ordinary limit, reference may be made to the Treaty of the 27th November, 1888, between Great Britain and that country, of which the last paragraph of Article IV is as follows:

The two Contracting Parties agree to consider, as a limit of their territorial waters on their respective coasts, the distance of 4 marine leagues reckoned from the line of low-water mark. Nevertheless, this stipulation shall have no effect, excepting in what may relate to the observance and application of the Custom-house Regulations and the measures for preventing smuggling, and *cannot be extended to other questions of civil and criminal jurisdiction or of international maritime law.*

Now, Sir, I have come to the end of the examples as regards fishery laws; and I have next to draw attention to the general principles of the applicable to legislation of this class, as set out on page 55 of the Argument, where we say:

Throughout the foregoing discussion of the legislation of various nations, certain principles of law have been referred to, the full explanation of which had necessarily to be postponed until the examinations were completed.

For convenience these principles will now be collected, and will then be separately examined:

(I) That by the universal usage of nations, the laws of any state have no extra-territorial application to foreigners, even if they have such application to subjects.

(II) That Great Britain has incorporated this principle into her own law by a long-established usage, and a series of decisions of her Courts; and that the law of the United States is identical.

(III) That the British Colonies have no power to legislate for foreigners beyond the colonial limits.

(IV) That international law has recognized the right to acquire certain portions of the waters of the sea and the soil under the sea, in bays, and in waters between islands and the mainland.

(V) That the analogy attempted to be traced by the United States between the claims to protect seals in Behring Sea, and the principles applicable to coral reefs and pearl beds, is unwarranted.

(VI) And, finally, that there is no complete or even partial consent of nations to any such pretension as to property in, and protection of, seals as set up by the United States.

Now, as regards the first of these points, that there is no extra-
1164 territorial application of the laws of any State to foreigners, I do not feel it incumbent upon me to labour that point, because it is conceded practically, I think, by my learned friend, Mr. Phelps, in his Argument. He admits that, as laws they have no extra-territorial effect. His contention, with which I have already dealt, and to which I must recur again, is that although they have no extra-territorial effect as laws, yet they may have some effect under another denomination which my learned friend calls self-defensive or self-preservative regulations. I have, as I say, already dealt with that; but I will recur to it, momentarily at least, again.

The next proposition is that the laws of Great Britain have no extra-territorial application to foreigners. Chief Justice Cockburn, in that case to which I have before referred of *the Queen* v. *Keyn*, states the proposition thus, on page 73 of the report:

Where the language of a statute is general and may include foreigners or not, the true canon of construction is to assume that the legislature has not so enacted as to violate the rights of other nations.

And in that connection also there is a quotation from a judgment of Lord Stowell in the "Le Louis", which I will refer to later. I will not read it now.

At the top of page 57 of our Argument, a case is referred to which is not unimportant, in which Lord Justice Turner, a Judge of the Appeal Court, says:

This is a British Act of Parliament, and it is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners; in order to warrant such a conclusion, I think that either the words of the Act ought to be express or the context of it very clear.

And again Baron Parke, in Jeffreys v. Boosey, said:

The Legislature has no power over any person except its own subjects, that is, sons natural-born subjects, or resident, or whilst they are within the limits of kingdom; the Legislature can impose no duties except on them, and when legis-ing for the benefit of persons must *prima facie* be considered to mean the benefits hose who owe obedience to our laws, and whose interest the Legislature is under orrelative obligation to protect.

There is a remarkable illustration of this in the case referred to of parte Blain, re Sawers:

he question arose as to the application of the English Bankruptcy Law to igners in England; the definitions of acts of bankruptcy in the Statute include commission of certain acts "in England or elsewhere;" yet it was held by the rt of Appeal that a foreigner in England, although on general principles he was ect to English law, could not be made bankrupt unless he had committed an act ankruptcy in England. The words "or elsewhere" were held not to apply to a foreigner on the principles above stated.

have already referred to the case of *Queen* v. *Keyn*, and I will not eat the reference to that case.

The next principle adverted to is that the Colonies have no 5 power of extra-territorial legislation for foreigners. That principle follows from the one which I enunciated early this morn-, namely that these colonial Legislatures are acting under a dele-ed authority, an authority delegated to them by the Imperial Par-nent and that they have no power to bind any one outside their own itory. A very remarkable illustration of that is mentioned at page n the case of *Macleod* v. *Attorney General for New South Wales*, ich arose in this way. The charge was that Macleod had committed amy. The local statute enacted that:

hosoever being married marries another person during the life of the former band or wife, wheresoever such second marriage takes places, shall be liable to al servitude for seven years.

Here were general words similar to the words "any person", so much ied on by the United States.

The Judicial Committee nevertheless rejected their general appli-ion. They said:

The colony can have no such jurisdiction, and their Lordships do not desire to tribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an ent as would be inconsistent with the powers committed to a colony, and indeed onsistent with the most familiar principles of international law....
The words "whosoever being married" mean whosoever being married and who is enable at the time of the offence committed to the jurisdiction of the colony....
'Wheresoever" may be read, "Wheresoever in this colony the offence is com-tted."

So that although the words of the statute were "whosoever being arried"—without any limitation of place—"marries another person uring the life of the former husband or wife, wheresoever such second arriage takes place, shall be liable to penal servitude for seven ears"—where the first marriage had taken place inside the colony, d the second marriage outside it, it was held that the man could not convicted under the terms of that section for bigamy.

The case is reported in the "Appeal Cases" of the Law Reports for 91, at page 445. I have the case before me and it is at the disposition any of the tribunal who desire to read it. The considered judgment the Court was delivered by the late Lord Chancellor. On page 458, e says:

The result as it appears to their Lordships must be that there was no jurisdiction to y the alleged offender for this offence, and that this conviction should be set aside.

Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories and the maxim which has been more than once quoted "*extra territorium jus dicenti impune non paretur*" would be applicable to such a case.

Then, Mr. President, follows a statement on page 59 of our Argument of those cases where the law does recognize the right of a State to acquire certain portions of the water of the sea and of the
1166 soil under the sea, and to include them within its territory; I do not stop to dwell upon them because I do not conceive it necessary, but they will all be found to be cases which are either defensible as being bays or within a headland offing, or being simply portions of contiguous sea as to which possession, or what was treated as possession, has been acquired.

Then at the bottom of page 59, and on page 60, there is a brief consideration of the point of whether there can be said to be any analogy between the claim to property in and to protect free swimming animals such as fish and seals, and a like claim in respect of oysters which have a fixed *locus*, or coral beds which have a fixed *situs:* but I do not propose to trouble you with dwelling upon that subject. I have so frequently enunciated the principle that I do not desire to do more than refer to it in the words of Chief Justice Cockburn in the case of *Queen* v. *Keyn*, which is a case deserving of notice on many grounds, first because of the examination of the general law to which many judicial minds on that occasion applied themselves, but also because the case itself was a remarkable illustration of the regard paid by the law of England to that principle of strictly confining a law of a country to the territorial limits of that country. What was that case? It was the case of an offence supposed to have been committed within three miles of the coast, and therefore within the narrowest limit fixed as the territorial zone; and yet the majority of that Court declined to affirm the proposition that the Courts of Great Britain had jurisdiction, without legislation, to deal with an offence committed within the three mile limit: it was a very remarkable illustration of the tenacity with which that principle is observed.

On the next page of our Argument, page 60, we recur to the argument on the "Hovering Acts", as towhich, incidentally, I shall have to say a word presently in connection with a case to which I shall call attention. The Quarantine Acts have already been dealt with, and I do not trouble the Tribunal with that matter.

I therefore invite the Tribunal on this part of the case to arrive at the conclusion that the assertion by the United States that the practice of nations supports the claim now put forward is without foundation. If it is regarded as an assumption of jurisdiction on the high sea, it was entirely beyond the power of the United States Congress to pass the act applying to foreigners; for, without the acquiescence of other nations, and without example in the practice of other nations, it infringes upon the rights of those nations upon the high seas.

If, on the other hand, it is to be regarded as part of the general jurisdiction exercised by the United States over Behring Sea, it was also beyond the power of the United States to make the act apply to foreigners; for, without the consent of other nations, and without example in the practice of other nations, it extended the territorial waters of the United States to a limit hitherto unknown and unrecognized, and in so doing, it infringed upon the rights of other nations upon the high seas.

I have already dealt with the other view in which this ques-
67 tion is put, and, as I have said, I must recur to it, namely, the so-called self-preservative or self-defensive regulations. There-
re I claim that the answer to the fifth question ought to be, as given
page 63 of our Argument, namely:

That the United States have no right (*a*) of protection, or (*b*) of property, in the
ls frequenting the islands of the United States in Behring Sea when they are
nd outside the ordinary 3-mile limit.

There is one other case, to which I must make an allusion. That is
e exceptional case of the St. Helena Act of 1815, the history of which,
doubt, Sir, is in your mind. I think I may content myself with
ding what is said in the Argument upon it. Mr. Blaine, you will
ollect in one of his earliest dispatches, which is set out in the first
lume of the United States Appendix, at page 283, refers to this Act,
d says:—Here is an island in mid-ocean, and the Government of Great
itain assumed an authority and power to exclude the commerce of
tions from the approach to that island for its own political ends, an
umption of jurisdiction and of authority much greater than they allege
are claiming in this case.

The facts are shortly and correctly set out at page 61 of our argu-
nt; and I have got before me, in order to supplement that statement,
opy of the Articles of the Treaty upon the subject, signed in Paris,
the 2nd of August, 1815, authorizing this exceptional Act. The
tement in the Argument is this:

t the peace of 1815 it was determined by Great Britain in conjunction with the
ed Powers, that St. Helena should be the place allotted for the residence of the
peror Napoleon Buonaparte, under such regulations as might be necessary for the
fect security of his person; and it was resolved that, for this purpose, all ships
atever.—

Mr. Justice HARLAN.—It was resolved by whom; by the parties to
t Treaty?

Sir CHARLES RUSSELL.—The parties to this Treaty; yes. You will
in a moment, sir. I have got before me a copy of the Articles of
15.

nd it was resolved that for this purpose, all ships whatever, British and foreign,
epting only the East Indian Company's ships, should be excluded from all approach
the island. Notice was accordingly given by the British Chargé d'Affaires at
shington to the United States Government on the 24th November, 1815, that a
aty of Commerce between Great Britain and the United States, dated the 3rd
y, 1815, under Article III of which liberty of touching for refreshment at the island
s given to United States vessels, could not be carried out in this respect; and
t the ratifications of the Treaty would be exchanged under the explicit declara-
n that United States vessels could not be allowed to touch at, or hold any com-
nication whatever with, the island, so long as it should continue to be the resi-
ce of the Emperor. The Treaty was ratified on this understanding.

So that, so far as the United States was concerned, although not a
rty to the Treaty itself, it assented to that, and ratified a Treaty of
Commerce with Great Britain on the express stipulation that that
68 Treaty should be subject to the effect of the arrangement which
I am now about to explain. So far, therefore, as the United
ates is concerned, that is the position of things. Now, how do the
atters stand as regards the other Powers? The Articles of the Treaty
hich bear upon this matter are in these terms:

ART. 1. Napoleon Buonaparte is considered by the Powers who have signed the
eaty of the 25th of March as their prisoner.

ART. 2. His custody is especially entrusted to the British Government. The choice
the place and of the measures which may best secure the object of the present
ipulation are reserved to his Britannic Majesty.

That is the Treaty of the other Powers. Now, is it not enough to say—

Mr. PHELPS.—What are you reading from, Sir Charles?

Sir CHARLES RUSSELL.—The Articles of the Treaty.

Mr. PHELPS.—What Treaty?

Sir CHARLES RUSSELL.—The Treaty between the Powers, by whom the charge of the Great Emperor was committed to the British Government.

Mr. PHELPS.—Is that in the Case anywhere?

Sir CHARLES RUSSELL.—No; it is not in the Case; but it is not material that it should be in the Case. I am reading a historic document. But surely, it is enough to say about this matter, without more, that it is no reference, no guide to this Tribunal, and throws no light whatever upon the question that we are discussing. It was not an assertion of any general right upon the part of Great Britain. It was a case in which a number of the Powers—the allied Powers, as they were called—at the close of a long and disastrous war, took these measures, and, so far as the United States is concerned, took these measures with the implied assent of the United States.

The PRESIDENT.—Was that assented to by the United States?

Sir CHARLES RUSSELL.—Yes. I have read, Sir, the grounds upon which I base that argument. The matter stood thus: The United States and Great Britain had entered into a Treaty of commerce. Before the ratification of that Treaty, when it would become binding upon both the Powers, this arrangement as to the custody of the Great Emperor was entered into by the Allied Powers. Upon that, communication is made by the British Government to the United States Government, and they are told, "We can only ratify the Treaty subject to your recognizing that you have no longer the right to touch at St. Helena, or to go within a stipulated distance of it."

The PRESIDENT.—And that communication was accepted?

Sir CHARLES RUSSELL.—That communication was accepted, and the Treaty ratified after that communication was made. Therefore it does not lie in their mouth to say that that was something they were obliged to do, or which was put upon them by compulsion.

Senator MORGAN.—I think the United States might be justly credited with having accepted and admitted, in that arrangement, the
1169 proposition that the great nations of the earth, in providing for their security and the security of their political rights, could impose upon other Powers a recognition of this exception that they had made in the open sea for the security of the Emperor Napoleon; and so they could make an exception of like character for the security of any great industry or any great enterprise, or any other thing that would concern the affairs of the whole commercial world.

Sir CHARLES RUSSELL.—If I may respectfully say so, Sir, there is a great chasm between the premise and the conclusion.

Senator MORGAN.—I do not happen to see it.

Sir CHARLES RUSSELL.—To answer it in detail, Mr. Senator, would indeed cause a very wide deviation from my path.

Lord HANNEN.—I was going to ask what was the effect of the restraint. I think it was only this. All vessels were forbidden to touch at the islands.

Senator MORGAN.—A little more.

Lord HANNEN.—I was going to add, and the rest is analogous to the Hovering Acts. There was nothing to prevent vessels sailing through the waters adjoining St. Helena; but they were not allowed to hover in those waters.

Senator MORGAN.—I beg your pardon. They were not allowed to approach within fifteen miles.

Sir CHARLES RUSSELL.—I rather thought the distance was more than fifteen miles.

Senator MORGAN.—It may be more, but it is at least that.

Lord HANNEN.—I was only inviting you to give us the terms, which are not in my recollection.

Sir CHARLES RUSSELL.—I thought we had it in the United States Case, but we have not.

Senator MORGAN.—It was 26 miles, was it not?

Sir CHARLES RUSSELL.—I have got a note from the Archivist of the Dominion of Canada, Mr. Brymner, and there is no reason why I should not read the whole of it. My friend will have no objection, probably.

Mr. PHELPS.—You will find the Act, Sir Charles, on page 495 of the first Volume of the United States Appendix.

Sir CHARLES RUSSELL.—There is only a part of the Act, I think, set out there Mr. Phelps.

Mr. PHELPS.—All that touches this point. Section 4, is there.

Sir CHARLES RUSSELL.—Then I had better read it:

IV. And be it further enacted. That it shall and may be lawful to and for the Governor, or in his Absence the Deputy Governor of the said Island for the time being, or for the Commander for the time being of His Majesty's Naval or Military Forces stationed off or at the said Island, respectively, and the Persons acting under his or their Orders and Commands, respectively, by all necessary Ways and Means to hinder and prevent any Ship, Vessel, or Boat, Ships or Vessels, or Boats (except Ships and Vessels of and belonging to or chartered by the said United Company of Merchants, also duly licensed by the said Company for that Purpose, as herein-
1170 before mentioned), from repairing to, trading, or touching at the said Island, or having any Communication with the same; and to hinder and prevent any Person or Persons from landing upon the said Island from such Ships, Vessels or Boats, and to seize and detain all and every Person or Persons that shall land upon the said Island from the same; and all such Ships, Vessels or Boats (except as above excepted) as shall repair to, or trade, or touch at the said Island, or shall be found hovering within Eight Leagues of the Coast thereof.

Lord Hannen is quite right.

And which shall or may belong, in the Whole or in Part, to any Subject or Subjects of His Majesty, or to any Person or Persons owing Allegiance to His Majesty, shall and are hereby declared to be forfeited to His Majesty, and shall and may be seized and detained, and brought to *England*, and shall and may be prosecuted to Condemnation by His Majesty's Attorney General, in any of His Majesty's Courts of Record at *Westminster*, in such manner and form as any Ship, Vessel or Boat may be seized, detained, or prosecuted for any Breach or Violation of the Navigation or Revenue Laws of this Country; and the Offence for which such Ship, Vessel or Boat shall be proceeded against shall and may be laid and charged to have been done and committed in the County of *Middlesex;* and if any Ship, Vessel or Boat not belonging, in the Whole or in Part, to any Person or Persons the Subject or Subjects of or owing Allegiance to His Majesty, his Heirs and Successors, shall repair to or trade or touch at the said Island of *Saint Helena*, or shall be found hovering within Eight Leagues of the Coast thereof, and shall not depart from the said Island or the Coast thereof when and so soon as the Master or other Person having the Charge and Command thereof shall be ordered so to do by the Governor or Lieutenant Governor of the said Island for the time being, or by the Commander of His Majesty's Naval or Military Force stationed at or off the said Island for the time being (unless in case of unavoidable Necessity, or Distress of Weather), such Ship or Vessel shall be deemed Forfeited.

Lord HANNEN.—There is no restriction against sailing through the waters. It is only against hovering.

Sir CHARLES RUSSELL.—None at all.

And shall and may be seized and detained and prosecuted in the same manner as hereinbefore enacted as to Ships, Vessels or Boats of or belonging to any Subject or Subjects of His Majesty.

You will see how very strained and exaggerated is the reference by Mr. Blaine in the letter to which I have referred, which is that enormously long letter of the 17th of December, 1890. It covers some 27 pages, but the passage in question is on page 283. The first part of it admits the point I have just mentioned.

Before the ratifications of the treaty were exchanged, in the following November, it was determined that Napoleon should be sent to St. Helena. England thereupon declined to ratify the treaty unless the United States should surrender the provision respecting that island. After that came the stringent enactment of Parliament forbidding vessels to hover within 24 miles of the island. The United States was already a great commercial power. She had 1,400,000 tons of shipping; more than 500 ships bearing her flag were engaged in trade around the capes. Lord Salisbury has had much to say about the liberty of the seas, but these 500 American ships were denied the liberty of the seas in a space 50 miles wide in the South Atlantic Ocean by the express authority of Great Britain.

I say that is not correct at all; that all they were prohibited
1171 from doing was to hover there. There was nothing to prevent them sailing within three miles of the coast, if they were proceeding upon their voyage.

Mr. Justice HARLAN.—When he uses the word "liberty" there, he means the right to use the island in the ordinary way upon terms of equality; and the Act does prevent other vessels from trading.

Sir CHARLES RUSSELL.—But this would convey to the ordinary reader, Mr. Justice Harlan with great deference, that there was an exclusion by their being denied the liberty of the seas for that space of 50 miles. He is reckoning there 25 miles on each side of the island. He conveys the idea that there is an exclusion from that distance. There is nothing of the kind. What the mandate, or whatever it is to be called, amounts to is a prohibition against landing and a prohibition against hovering within that distance; but if a vessel is upon its journey east or west, there is nothing to prevent its sailing as close to the island as it wishes—nothing whatever.

But I need not say that an exceptional case, under exceptional circumstances, forms no precedent whatever.

Now may I in this connection, as it has come up, again reiterate what I have before said: that these isolated instances of assertion, well or ill founded, prove nothing as to what is the rule or principle of international law. The principle of what is international law is well stated by the late Chief Justice Cockburn at page 63 of the report of his judgment.

He is applying it to the question of the three mile zone, and treating that still as, to some extent, an undetermined matter.

And when in support of this position, or of the theory of the three-mile zone in general, the statements of the writers on international law are relied on, the question may well be asked—upon what authority are these statements founded? When and in what manner have the nations who are to be affected by such a rule as these writers, following one another, have laid down, signified their assent to it?—to say nothing of the difficulty which might be found in saying to which of these conflicting opinions such assent had been given.

For, even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilized nations of the world? For writers on international law, however valuable their labours may be to elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express—as by treaty, or the acknowledged concurrence of governments—or may be implied from established usage—an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in the ports of a foreign state they are subject to

al law as well as to that of their own country. In the absence of proof of as derived from one or other of these sources, no unanimity on the part of ical writers would warrant the judicial application of the law on the sole ty of their views or statements.

in my opinion would the clearest proof of unanimous assent on the part of ations be sufficient to authorize the tribunals of this country to apply with- Act of parliament, what would practically amount to a new law. In so doing re should be unjustifiably usurping the province of the legislature. The assent f nations is doubtless sufficient to give the power of parliamentary legislation n a matter otherwise within the sphere of international law; but it would be ess to confer, without such legislation, a jurisdiction beyond and unknown to , such as that now insisted on, a jurisdiction over foreigners in foreign ships rtion of the high seas.

r I am glad, Mr. President, to have made considerable progress, have gone a long way towards getting to the end of this argu- but there are still some matters with which I must trouble you. are three cases referred to by my friend, Mr. Phelps, in his Argu- which deserve consideration by themselves. They are the cases *urch* v. *Hubbart; Rose* v. *Himely;* and *Hudson* v. *Guestier.*

r the case of *Church* v. *Hubbart*, of which both Mr. Phelps and arter made some use in their arguments, when you come to con- it, is really about the simplest case in the world; and, if I may owed to say so of so great a Judge as Chief Justice Marshall, it simple a case that I am surprised that he found himself able to an important judicial utterance depend upon it.

r I will tell the Court what the case was. It was not a case ing the question of international rights as between nations, at was a case between a man who had insured his ship "the Aurora" n underwriter, who was the insurer; and in the policies of insur- there was an exception from the general risk which the under- undertook. I am now speaking with the report in the 2nd of h's Reports, page 187, before me. There were two policies of nce; in each case there was excepted from the general risk which nderwriter undertook, these words: in one policy "The insurers t liable for seizure by the *Portuguese* for illicit trade." In the "The insurers do not take the risk of illicit trade with the *Portu-* And it was held (and I think quite rightly held), that those two tions meant the same thing. The sole question, therefore, in nining whether the underwriter was liable or not, was whether izure of a ship, which was in fact seized by the Portuguese author- was to be regarded as a seizure by the Portuguese authorities for ing in illicit trade, or whether it was to be regarded as an unjus- e and gratuitous act of maritime trespass. That was absolutely le question in the case.

r the Portuguese Government had forbidden trade with particular in its dominions, and the facts found by the Judge who enquired hem, in order to ascertain whether the vessel was seized for illicit are set out at page 192, where it is stated that in consequence of ts of examination made on board the brig Aurora, and of ques- put to her Captain, and so on, the Judge comes to the conclusion

motives hereby alleged for having put into a port of this establishment are edented, and inadmissible, and the causes assigned cannot be proved.

It was alleged that she had gone in there for water or some other need, and not for illicit trade. The Judge came to the con- clusion that that was not true. He says:

erefore believe it to be all affected for the purpose of introducing here com- l and contraband articles of which the cargo is composed; if there are not motives besides these, of which there is the greatest presumption.

And then the Judge of First Instance proceeds to justify that further examination of the case; and he finally comes to the conch that if it had only been their intention to look for the same coast, it is presumed he was making for it for the purpose not of busines of smuggling.

Now that being the state of the case, it is argued on the one side the seizure was not one which, by the strict letter of the Portu law, was authorized, or by international law was authorized, be the vessel had not gone into ports trade with which was forbidden was anchored some four leagues off the coast; although the maste gone in, as alleged, for the purpose of making arrangements fo illicit trade, it was argued that as the ship was seized beyond the mile limit it was practically an act of maritime trespass.

The learned Judge deals with that in a way that I will call your tion to. The argument is enormously long, and the judgment, resembles it, is at page 231. On page 232 Chief Justice Marshall

The words of the exception in the first policy are: The insurers are not lia seizure by the Portuguese for illicit trade.

Then he repeats the words in the second policy; and then he s

For the plaintiff it is contended, that the terms used require an actual between the vessel and inhabitants, and a seizure in consequence of that tra at least that the vessel should have been brought into port in order to com a case which comes within the exception of the policy.

It was a question upon the policy. Then he goes on:

But such does not seem to be the necessary import of the words. The enlarged and liberal construction given to the defendants, is certainly warran common usage.

Then he goes on:

In this case the unlawfulness of the voyage was perfectly understood b parties.

That is to say, you the underwriter knew the unlawfulness trade which you were not going to take upon yourself the conseq of; you the assured knew the unlawfulness of the particular tr which you agreed you would take upon yourself the risk and not put it upon the underwriter.

Then he goes on to say:

That the crown of Portugal excluded, with the most jealous watchf
1174 the commercial intercourse of foreigners with their colonies, was prob
fact of as much notoriety as that foreigners had devised means to elu watchfulness, and to carry on a gainful but very hazardous trade with those co If the attempt should succeed, it would be very profitable, but the risk atten was necessarily great. It was this risk which the underwriters, on a fair const of their words, did not mean to take upon themselves. "They are not liable say, "for seizures by the Portuguese for illicit trade". They do not take t of illicit trade with the Portuguese; now this illicit trade was the sole and a object of the voyage, and the vessel was engaged in it from the time of her l the port of New-York.

Therefore, really, as it seems to me, this matter might have there, and it did not require to examine whether or not the thing be said to be strictly defensible or justifiable by international la make the risk one within the contemplation of both parties t contract, and one which the underwriter never intended to take himself, and which the assured never thought the underwrite taking upon himself. No doubt, the learned Judge does go more w into the question, and he does on page 234 examine the power of na within and without their territory, but in a way which, it seems t

so far from helping, disproves the contention which my learned friends are submitting, as I think you will see.

The learned Judge says:

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the Aurora, and that this seizure is, on that account, a mere marine trespass, not within the exception, cannot be admitted. To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory.

Upon this principle the right of a belligerent to search a neutral vessel——

Here we get at once to belligerent rights——

On the high seas for contraband of war is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy: so too a nation has a right to prohibit any commerce within its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has the right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same in all times and in all situations, If they are such——

this is the part which is conclusive against the suggestion of right which my learned friend is making——

if they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exertions. If they are such as are reasonable and necessary to secure their laws from violation they will be submitted to.

1175 And again:

Thus in the channel, where a very great part of the commerce, to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the Government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted.

Again, the principle is stated, which I have already enunciated, and which will be found again and again echoed in the textwriters, this being a question of the protection of revenue laws, the whole jurisdiction or assertion of authority is not based on the absolute right of one nation to put that authority in force, but on the fact that if the regulations are reasonable, and are recognized as such by the authority of the country against whose nationals they are to be enforced, they will be assented to; but if they are extended too far, they will be resisted. It is not the assertion of an absolute right—it is the assertion of a qualified measure of protection depending, for its sufficient exercise, upon assent.

Now the rest of the judgment I need not trouble the Tribunal with, because it has no bearing upon the point with which I am concerned. There is also another reason for dismissing it as an authority upon this question, that it was not necessary to the decision whether the risk was within the policy or not, for that alone was the point to be determined, and it was to be determined by municipal law.

Now I come to the two cases of *Rose* v. *Himely*, and *Hudson* v. *Guestier*, I have spent some hours with the assistance of my friends, Mr. Box and Mr. Piggott, in trying to get at the meaning of these cases which occupy a very considerable space in the Reports, but when you come to

the bottom of them they will be found really to be of very little help indeed to this Tribunal. Now I will try shortly to explain what these cases were. The case of *Rose* v. *Himely* was a claim to a cargo of coffee and the then owner and possessor of the coffee claimed his title to it under a foreign judgment of condemnation of a Court—of San Domingo, which was French territory; and the main question discussed was whether or not the American Court could go behind the foreign judgment to examine the question of jurisdiction: whether the facts as they existed gave the Court jurisdiction to entertain the matter. Chief Justice Marshall and three of his colleagues held that they were warranted in examining the question of the jurisdiction of the Court in relation to the constitutional powers of the Court, and in relation to the situation of the thing condemned; but the dissenting judge, Mr. Justice Johnson, in a very elaborate and able judgment, dissented from those views and came to the conclusion that the principal judgment was not examinable at all; and in the course of that judgment—indeed in the course
1176 of both judgments—a great deal of matter is gone into by both of them a good way outside the particular point in hand. Chief Justice Marshall's judgment is rather more closely, as it seems to me, to the point; but Mr. Justice Johnson's, (whose judgment is found in page 221 of the report of the case 4th volume of Cranch's Reports) may be correctly summed up in this sentence: that there was no right to inquire into the cause of capture or to review the judgment of the Prize Court, but that if there were power to go behind, then he regarded the seizure in the case in question as legitimately made and not as an enforcement of a municipal act, but as an assertion of a belligerent right. That is the sum and substance of *Rose* v. *Himely*.

In the case of *Hudson* v. *Guestier*, the question came up again, and upon substantially the same facts, because although it appears in one part of the case of *Hudson* v. *Guestier* that the seizure was not made, as in *Rose* v. *Himely*, outside the three miles, but according to one statement in *Hudson* v. *Guestier* was made within the three miles, yet the Judges in their judgment treat the facts as if they were similar, and nothing turns on the question whether it was inside or outside three miles.

Mr. CARTER.—There were two trials. On the first trial it appears to have been within the three miles, and on the second trial further out.

Sir CHARLES RUSSELL.—That very likely explains how it is variously stated as a seizure *within*, and a seizure *without*, the 3 mile limit. However, the result of the case is what I desire to call attention to. The result was that the Judges in that second case took the view which Mr. Justice Johnson had taken in the first, namely that the foreign judgment was not examinable. And therefore says Chief Justice Marshall at the end of the case, "My judgment in *Rose* v. *Himely* is therefore to be taken as overruled." That is exactly the result. I hope my friends will not differ from me about it, because we have examined it with as much care as it is possible to bestow upon it, and I think that is really what it does come to. The passage I refer to in *Hudson* v. *Guestier* is this—

Senator MORGAN.—Was it a prize Court in San Domingo?

Sir CHARLES RUSSELL.—Yes, it was a prize Court in San Domingo. The other Judges, except the Chief Justice, concurred in the judgment of Mr. Justice Livingston, whose judgment was appealed from and which deals with the point whether the original judgment was examinable, and the Chief Justice observed that he had supposed that the former opinion delivered in this case upon the point had been concurred in by four Judges, but in this he was mistaken, and so on.

›wever, he says in conclusion, that the principle of that case of v. *Himely* is now overruled.

›w I have read these cases with all possible desire to get to the bot- of them, and try and see what information they would give, by of assistance to the Tribunal—but beyond certain expressions h are to be found in them here and there, not always quite *ad rem* ıe particular points they were discussing, some in the judgment of Chief Justice Marshall and some in the judgment of Mr. Justice Johnson, there is really nothing that is of any material aid to the Court. I want however to explain to the Court how those s were regarded by a textwriter whom we certainly, in England, ider as a textwriter of some authority—I mean Mr. Dana, in his on of Wheaton, which is an American book of authority. I observe riend Mr. Phelps in the Argument does not treat Mr. Dana as g a person of very high authority. I will only observe in relation ıat that his edition of Wheaton is received with respect in the lish Courts; and as regards his ability and position, I can point to act that he was the Counsel chosen by a very able Secretary of e, himself a distinguished lawyer, to represent the interests of the ed States on the Halifax Fisheries Arbitration: the Secretary of e who selected him was Mr. Secretary Evarts, who is known to some ıe Tribunal and known to me personally as a lawyer of distinction. Evarts not only selected Mr. Dana, but speaking of his selection, ongratulates the United States on having been able to secure a ısel of such distinguished eminence.

ıe passage I am now about to read is printed in the print handed the Members of the Tribunal a few days ago. It is an intelligent cism upon the whole of this part of the law, shortly described as 'hovering principle", if it can be designated by the nane of "prin- ". I refer to the note to section 180: the note being 108, and the 208 in the 8th edition. In section 179 he refers to the exclusive torial jurisdiction over the inclosed parts of the sea along the coast d the King's Chambers: he proceeds:

ıppears from Sir Leoline Jenkins that both in the reigns of James I and es II the security of British commerce was provided for by express prohibitions st the roving or hovering of foreign ships of war so near the neutral coasts and urs of Great Britain as to disturb or threaten vessels homeward or outward l; and that captures by such foreign cruizers even of their enemy's vessels l be restored by the Court of Admiralty, if made within the King's Chambers. o the British "Hovering Act", passed in 1736 (9 Geo. II, cap. 35), assumes, for n revenue purposes, a jurisdiction of 4 leagues from the coasts, by prohibiting n goods to be transhipped within that distance without payment of duties. ilar provision is contained in the Revenue Laws of the United States; and hese provisions have been declared by judicial authority in each country to be tent with the law and usage of nations.

s note upon that includes a criticism of *Church* v. *Hubbart*, and ıps you will be good enough to allow my learned friend Mr. Box to it.

e PRESIDENT.—Certainly.

. M. H. BOX.—

Municipal Seizures beyond the Marine League or Cannon-shot.—The statement in xt requires further consideration. It has been seen that the consent of nations ls the territory of a State to a marine league or cannon-shot from the coast. lone within this distance are within the sovereign territory. The war right of visit and search extends over the whole sea. But it will not be found that any consent of nations can be shown in favour of extending what may be strictly called territoriality, for any purpose whatever, beyond the marine e or cannon-shot. Doubtless States have made laws, for revenue purposes, ing acts done beyond territorial waters; but it will not be found that, in later

times, the right to make seizures beyond such waters has been insisted upon against the remonstrance of foreign States, or that a clear and unequivocal judicial precedent now stands sustaining such seizures, when the question of jurisdiction has been presented. The Revenue Laws of the United States, for instance, provide that if a vessel bound to a port in the United States shall, except for necessity, unload cargo within 4 leagues of the coast, and before coming to the proper port for entry and unloading, and receiving permission to do so, the cargo forfeit, and the master incurs a penalty (Act of the 2nd March, 1797, § 27); but the Statute does not authorize a seizure of a foreign vessel, when beyond the territorial jurisdiction. The Statute may well be construed to mean only that of a foreign vessel, coming to an American port, and there seized for a violation of Revenue Regulations committed out of the jurisdiction of the United States, may be confiscated; but that, to complete the forfeiture, it is essential that the vessel shall be bound to, and shall come within, the territory of the United States, after the prohibited act. The act done beyond the jurisdiction is assumed to be part of an attempt to violate the Revenue Laws within the jurisdiction. Under the previous sections of that Act, it is made the duty of revenue officers to board all vessels, for the purpose of examining their papers, within 4 leagues of the coast. If foreign vessels have been boarded and seized on the high sea, and have been adjudged guilty, and their Governments have not objected, it is probably either because they were not appealed to, or have acquiesced in the particular instance, from motives of comity.

The cases cited in the authors's note do not necessarily and strictly sustain the position taken in the text. In the "Louis" (Dodson, ii, 245) the arrest was held unjustified, because made in time of peace for a violation of municipal law beyond territorial waters. The words of Sir William Scott, on pp. 245 and 246, with reference to the Hovering Acts, are only illustrative of the admitted rule, that neighbouring waters are territorial; and he does not say, even as an *obiter dictum*, that the territory for revenue purposes extends beyond that claimed for other purposes. On the contrary, he says that an inquiry for fiscal or defensive purposes near the coast, but beyond the marine league, as under the Hovering Laws of Great Britain and the United States, "has nothing in common with the right of visitation and search upon the unappropriated parts of the ocean"; and adds, "a recent Swedish claim of examination on the high seas, though confined to foreign ships bound to Swedish ports, and accompanied, in a manner not very consistent or intelligible, with a disclaimer of all rights of visitation, was resisted by the British Government, and was finally withdrawn". Church *v.* Hubbard (Cranch, ii, 187), was an action on a policy of insurance, in which there was an exception of risks of illicit trade with the Portuguese. The voyage was for such an illicit trade, and the vessel, in pursuance of that purpose, came to anchor within about 4 leagues of the Portuguese coast; and the master went on shore on business, where he was arrested, and the vessel was afterwards seized at her anchorage and condemned. The owner sought to recover for the condemnation. The Court held that it was not necessary for the defendants to prove an illicit trade begun, but only that the risks excluded were incurred by the prosecution of such a voyage. It is true that Chief Justice Marshall admitted the right of a nation to secure itself against intended violations of its laws by seizures made within reasonable limits, as to which, he said nations must exercise comity and concession, and the exact extent of which was not settled; and in the case before the Court, the 4 leagues were not treated as rendering the seizure illegal. This remark must now be treated as an unwarranted admission. The result of the decision is, that the Court did not undertake to pronounce judicially in a suit on a private contract; that a seizure of an American vessel, made at 4 leagues, by a foreign Power, was void and a mere trespass. In the subsequent case of Rose *v.* Himeley (Cranch, iv, 241), where a vessel was seized 10 leagues from the French coast, and taken to a Spanish port, and condemned in a French Tribunal under municipal and not belligerent law, the Court held that any seizures for
1179 municipal purposes beyond the territory of the Sovereign are invalid; assuming, perhaps, that 10 leagues must be beyond the territorial limits for all purposes.

In Hudson *v.* Guestier (Cranch, iv, 293) where it was agreed that the seizure was municipal, and was made within a league of the French coast, the majority of the Court held that the jurisdiction to make a decree of forfeiture was not lost by the fact that the vessel was never taken into a French port, if possession of her was retained, though in a foreign port.

The judgment being set aside and a new trial ordered, the case came up again, and is reported in Cranch, vi, 359. At the new trial the place of seizure was disputed, and the Judge instructed the jury that a municipal seizure made within 6 leagues of the French coast was valid, and gave a good title to the defendant. The jury found a general verdict for the defendant, and exceptions were taken to the instructions. The Supreme Court sustained the verdict, not, however, upon the ground that a municipal seizure made at 6 leagues from the coast was valid, but on the ground

t the French decree of condemnation must be considered as settling the facts olved; and if a seizure within a less distance from shore was necessary to juris-tion, the decree may have determined the fact accordingly; and the verdict in Circuit Court did not disclose the opinion of the jury on that point. The Judges ered in stating the principle of this case and of *Rose v. Himely;* and the report ves the difference somewhat obscure.

his subject was discussed incidentally in the case of the "Cagliari," which was izure on the high seas, not for violation of Revenue Laws, but on a claim some-at mixed of piracy and war. In the opinion given by Dr. Twiss to the Sardinian ernment in that case, the learned writer refers to what has sometimes been ted as an exceptional right of search and seizure, for revenue purposes, beyond marine league; and says that no such exception can be sustained as a right. He s: "In ordinary cases, indeed, where a merchant-ship has been seized on the high , the sovereign whose flag has been violated waives his privilege, considering the nding ship to have acted with *mala fides* towards the other State, with which he amity, and to have consequently forfeited any just claim to his protection." He siders the Revenue Regulations of many States, authorizing visit and seizure ond their waters, to be enforceable at the peril of such States, and to rest on express or tacit permission of the States whose vessels may be seized.

may be said that the principle is settled that municipal seizures cannot be made any purpose beyond territorial waters. It is also settled that the limit of these ers is, in the absence of Treaty, the marine league or the cannon-shot.

cannot now be successfully maintained either that municipal visits and search be made beyond the territorial waters for special purposes, or that there are erent bounds of that territory for different objects. But as the line of territorial ters, if not fixed, is dependent on the unsettled range of artillery fire, and if fixed, t be by an arbitrary measure, the Courts, in the earlier cases, were not strict as tandards of distance where no foreign Powers intervened in the causes.

n later times, it is safe to infer that judicial, as well as political Tribunals will ist on one line of marine territorial jurisdiction for the exercise of force on foreign sels, in time of peace, for all purposes alike.

Sir CHARLES RUSSELL.—This, Mr. President, seems to us, as we sub-t, a very intelligible and very accurate criticism of the cases that are ere referred to.

For the purpose of this argument I have not felt called upon to enter on any very precise or critical examination of many points which may said to be in a certain degree indeterminate even at the present ment. I mean, whether it can be said that the territorial waters are solutely fixed at three miles: whether the law as to embayed waters and headlands, and various things of that kind, is perfectly clear.

30 These are matters as to which, unquestionably, even up to the present day, writers widely differ; but upon the question of the tent to which, territorially considered, a municipal law can operate, I not think that there can be any ground for difference of opinion: mely, that the statement which is attributed to that learned Judge—ected to the validity of a municipal seizure, that is a seizure under municipal law outside three leagues from the coast—is, at least, a tter that is far from being clear.

It is very difficult to see how, if once you recognize the fact that a atute can only operate co-terminously with the territory of the State, n can say that the municipal Statute, as of right, can operate outside any process of law. And without expressing (for it is not my func-n to do it) any opinion or view upon the matter, at all events I may so far as to say, that it is at least doubtful whether the true justi-ation for acts done even under the so-called Hovering Acts outside e territorial limits does not rest upon the implied assent of other untries who will not interfere to protect their own nationals if they lieve that those nationals have, in bad faith, been endeavouring to olate the laws of a friendly Power,—the State in question regarding ose laws as just, reasonable and necessary.

Lord HANNEN.—And you may add "and having similar laws of their wn".

Sir CHARLES RUSSELL.—Yes; and having similar laws of their own.

Mr. Justice HARLAN.—Do you think the Courts of those countries which passed those laws, can in administering them proceed as a matter of law upon that ground?

Sir CHARLES RUSSELL.—I should hardly like to answer that question, without consideration, unless you can refer me to some case where the question has been raised in litigation. I know no case where the Power, the ship of whose national has been seized, has interposed to raise the question of jurisdiction.

I do not wish to say anything with which my judgment does not go, though, of course, I submit it not as matter of opinion but of argument; but I think, as a matter of law, as a matter of strict right, it would be exceedingly difficult to justify a seizure under a municipal Statute outside the limits of territory. This I can say; while I am not giving up any right which properly belongs to the Power I represent, as far as I know (and I have had means of enquiring into this matter), there is no case, within a reasonable period of time from the present, in which any seizure has been effected under the Hovering Acts by Great Britain which has been in any way challenged or brought into question: and no seizure at all in recent years that I am able to trace, outside the territorial limits. Whether the actual authority is greater does not matter; I only state the fact that in recent time there has been no exercise of it.

But see how far away we are from the subject that is before us. This is to be said in defence of the principle of the Hovering Acts, that they are directed against an offence against the Revenue Laws of a
1181 country to be completed on the territory of that country; in other words, it is an offence which can be only consummated by coming within the territorial jurisdiction of the particular country.

Senator MORGAN.—That is not the case in regard to the Island of Saint Helena. There the "Hovering Act" was for the protection of a political right, not the Revenue.

Sir CHARLES RUSSELL.—I quite agree. If you ask me Senator (if I may respectfully put it so) if I will undertake to defend, upon strict legal principles, every act the Executive of the United States has done, or the Executive of Great Britain has done, or the Executive of any other great country has done, I decline the task. It is true that my learned friend, Mr. Carter, was not appalled by it. He went the length of defending various things done by various Powers, and satisfied himself he could bring them all within a proper justification of ascertained legal principles.

Mr. CARTER.—Well, it was not quite so broad as that.

Sir CHARLES RUSSELL.—I thought so, and I hoped that my learned friend was right in that. I confess I would not like to have that obligation imposed upon me.

The great point which we are here contending for, and which is the real point between us, is this; whether, in time of peace there is any justification upon the ground that the ship of one nation has got hold of a piece of property of another nation,—the right in time of peace, and outside the territorial limits upon the high seas,—for the claim to search that vessel, seize that vessel, bring it into a Prize Court, which is in fact a war tribunal, and there condemn it?

That is the question we are considering; and all these questions of the Hovering Act assist us very little indeed in that direction.

Senator MORGAN.—That is a belligerent act that relates to a past transaction.

Sir CHARLES RUSSELL.—It is a belligerent act, whether it relates a past or present transaction.

Senator MORGAN.—The right claimed by the United States, is in nature of self-defence, and relates to the prevention of a trespass mediately threatened or being consummated.

Sir CHARLES RUSSELL.—Yes; but the Senator must be good enough bear in mind those are not the facts.

The facts are the seizure of some of the vessels when the sealing s past and gone, and when they had the seal-skins on board.

Senator MORGAN.—I was speaking of principles of international , and not trying to make an application of them.

Sir CHARLES RUSSELL.—Very well; but I think you will find, Sir, t even that narrow application will not do.

now refer to those printed authorities, and if you will be good ugh to take the print that has been given to you I will refer first to case of the "Louis". This was decided by Lord Stowell in 1817, and the facts that gave rise to it were these. A French ship 2 engaged in the slave trade was condemned, and it came before Lord Stowell upon the question whether or not it could be justi- . He says:

pon the first question, *whether the right of search exists in time of peace*, I have to rve that two principles of public law are generally recognized as fundamental. is the perfect equality and entire independence of all distinct States. Relative nitude creates no distinction of right; relative imbecility, whether permanent asual, gives no additional right to the more powerful neighbour; and any advan- seized upon that ground is mere usurpation. This is the great foundation of lic law, which it mainly concerns the peace of mankind, both in their politic private capacities, to preserve inviolate. The second is, that all nations being al, all have an equal right to the uninterrupted use of the unappropriated parts he ocean for their navigation. In places where no local authority exists, where subjects of all States meet upon a footing of entire equality and independence, ne State, or any of its subjects, has a right to assume or exercise authority over subjects of another. I can find no authority that gives the right of interruption he navigation of States in amity upon the high seas, excepting that which the its of war give to both belligerents against neutrals. This right, incommodious ts exercise may occasionally be to those who are subjected to it, has been fully blished in the legal practice of nations, having for its foundation the necessities elf-defence, in preventing the enemy from being supplied with the instruments war, and from having his means of annoyance augmented by the advantages of itime commerce; against the property of his enemy each belligerent has the eme rights of war. Against that of neutrals—the friends of both—each has the t of visitation and search, and of pursuing an inquiry whether they are employed he service of his enemy, the right being subject, in almost all cases of an inquiry ngfully pursued, to a compensation in costs and damages.

Vith professed pirates there is no state of peace. They are the enemies of every ntry, and at all times, and therefore are universally subject to the extreme its of war.

Then I pass over a passage.

nother exploded practice was that of Princes granting private letters of marque inst the subjects of Powers in amity, by whom they had been injured, without ng able to obtain redress from the Sovereign or Tribunals of that country. But present, under the law, as now generally understood and practised, no nation can rcise a right of visitation and search upon the common and unappropriated parts the sea, save only on the belligerent claim.

Senator MORGAN.—I agree to that.

Sir CHARLES RUSSELL.—If you please. I will come to that later.

f it be asked why the right of search does not exist in time of peace as well as war, the answer is prompt: that it has not the same foundation on which alone s tolerated in war—the necessities of self-defence. They introduced it in war,

and practice has established it. No such necessities have introduced it in time peace, and no such practice has established it. . .

Piracy being excluded, the Court has to look for some new and peculiar ground; but, in the first place, a new and very extensive ground is offered to it by the suggestion, which has been strongly pressed, that this trade—

That is the slave trade:

if not the crime of piracy, is nevertheless *crime*, and that every nation, and, indeed, every individual, has not only a right, but a duty, to prevent in every place the commission of crime. It is a sphere of duty sufficiently large that is thus opened out to communities and to their members. But to establish the consequence
1183 required, it is first necessary to establish that the right to interpose by force to prevent the commission of crime commences not upon the commencement of the overt act, nor upon the evident approach towards it, but on the bare surmise grounded on the mere possibility; for unless it goes that length it will not support the right of forcible inquiry and search.

He then proceeds to consider that matter, and at the bottom of the page he continues.

It (the Court) must look to the legal standard of morality; and upon a question of this nature, that standard must be found in the law of nations as fixed and evidenced by general and ancient and admitted practice, by Treaties, and by the general tenour of the Laws and Ordinances, and the formal transactions of civilized States.

The next case was decided in 1824 by Chief Justice Marshall, and was also a slave case. He refers to the "Le Louis" and he goes on in the third paragraph:

In the very full and elaborate opinion given on this case, Sir William Scott, in explicit terms, lays down the broad principle that the right of search is confined to a state of war. It is a right strictly belligerent in its character, which can never be exercised by a nation at peace, except against professed pirates, who are the enemies of the human race. The act of trading in slaves, however detestable, was not, he said, "the act of freebooters, enemies of the human race, renouncing every country, and ravaging every country, in its coasts and vessels indiscriminately". It was not piracy.

The right of visitation and search being strictly a belligerent right, and the Slave Trade being neither piratical nor contrary to the law of nations, the principle is asserted, and maintained with great strength of reasoning, that it cannot be exercised on the vessels of a foreign Power, unless permitted by Treaty.

The next case of the "Apollon" I pass over. It has been already referred to in the discussion we had in relation to one of the illustrations given by Mr. Phelps.

The next is the judgment of Mr. Justice Story in "The Marianna Flora". He says:

It is necessary to ascertain what are the rights and duties of armed and other ships navigating the ocean in time of peace. It is admitted that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions. It is true that it has been held in the Courts of this country that American ships offending against our laws, and foreign ships in like manner offending within our jurisdiction, may afterwards be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages.

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all; appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, "*sic utere tuo, ut non alienum lædas.*"

1184 The case of "La Jeune Eugénie" is in the same category, and I do not think I ought to trouble the Tribunal with reading it. I pass on to the case of *Buron* v. *Denman* which was decided in 1848.

The law on the subject of slaves has been settled—

(says Baron Parke in summing up.)

by the case of "Le Louis," which has been referred to. That case was decided in the year 1817, by Sir William Scott, who went fully into the question of the legality of the Slave Trade, and laid down certain positions which have since been acquiesced in both in this country and abroad. Those positions are, first, that dealers in slaves are not pirates by the law of nations, and can only be made so by and according to the terms of a Treaty with the country to which they belong prohibiting the Slave Trade; secondly, that trading in slaves is not a crime by the law of nations; thirdly, that the right of stopping and searching ships in time of peace is not a right which can belong to any nation except by contract with the nation to which such ships belong; and, fourthly, that if there be a law in a particular country prohibiting the Slave Trade, it is not open to every one to punish the offender against that law, but proceedings must be taken in the Tribunals of his own country.

I have already read the Parliamentary discussion on the right of search, and I do not trouble you with it again. I have also read the passage from Dana's Wheaton.

In conclusion I read a passage from Phillimore dealing with this question of self-preservation. He says:

The right of self-preservation by that defence which prevents, as well as that which repels, attack is the next international right which presents itself for discussion, and which, it will be seen, may under certain circumstances, and to a certain extent modify the right of territorial inviolability.

The right of self-preservation is the first law of nations, as it is of individuals. A society which is not in a condition to repel aggression from without is wanting in its principal duty to the members of which it is composed, and to the chief end of its institution.

All means which do not affect the independence of other nations are lawful for this end. No nation has a right to prescribe to another what these means shall be, or to require any account of her conduct in this respect.

The means by which a nation usually provides for her safety are:

1. By alliances with other States;
2. By maintaining a military and naval force; and
3. By erecting fortifications and taking measures of the like kind within her own dominions.

I do not think there is any more that I need read, except on the top of the next page, paragraph CCIV.

We have hitherto considered what measures a nation is entitled to take for the preservation of her safety *within* her own dominions. It may happen that the same right may warrant her in extending precautionary measures *without* these limits and even in transgressing the borders of her neighbour's territory. For international law considers the right of self-preservation as prior and paramount to that of territorial inviolability, and, where they conflict, justifies the maintenance of the former at the expense of the latter right.

He then proceeds to consider the cases which have already
1185 been incidentally referred to: the case of ship "Carolne", which was sent adrift in the river between lake Erie and lake Ontario. It is not necessary for me to refer to that again.

Now there is one other set of authorities to which I should like to refer, and they are important because they show the position assumed by the United States upon this question, and continuously assumed by the United States as shown in the authoritative utterances of the executive head of the Government. I have a series of these utterances arranged in chronological order from the year 1843 down as late as 1880 or later.

Senator MORGAN.—Do you mean the Secretary of State?

Sir CHARLES RUSSELL.—In some cases the President, and in othe cases the Secretary of State.

I will give the references in each case. The first is a Message fro President Tyler in 1843, communicating to the House of Represent tives correspondence as to the construction of the Ashburton Treaty 1842, for, among other things, the final suppression of the African sla trade. Great Britain asserted that it authorized a mutual right search. The United States opposed this view successfully.

This is the way the President, who formulates his message after best legal and constitutional advice he could obtain, deals with this :

The attempt to justify such a pretension [that is, to subject the trade of the w to a system of maritime police adopted at will by a naval Power, in any places or i any articles which such Power might see fit to prohibit to its own subjects or citi zens] from the right to visit and detain ships upon reasonable suspicion of piracy would deservedly be exposed to universal condemnation, since it would be an attempt to convert an established rule of maritime law, incorporated as a principle into the international code by the consent of all nations, into a rule and principle adopted by a single nation, and enforced only by its assumed authority. To seize and detain a ship upon suspicion of piracy, with probable cause and good faith, affords no just ground either for complaint on the part of the nation whose flag she bears, or claim of indemnity on the part of the owner. The universal law sanctions, and the common good requires the existence of such a rule. The right, under such circumstances not only to visit and detain, but to search a ship, is a perfect right, and involve neither responsibility nor indemnity.

But with this single exception, no nation has, in time of peace, any authority detain the ships of another upon the high seas, on any pretext whatever, beyo the limits of her territorial jurisdiction.

Then in 1855 Mr. Marcy, the then Secretary of State, protestin against certain orders of the British and French Governments to nav commanders to prevent by force, if necessary, the landing of adventu ers, from any nation, on the Island of Cuba, with hostile intent, says

The right of visitation and search is a belligerent right, and no nation which i not engaged in hostilities can have any pretence to exercise it upon the open sea.

The established doctrine upon this subject is that the right of visitation and searc of vessels, armed or unarmed, navigating the high seas in time of peace does no belong to the public ships of any nation.

Senator MORGAN.—As against the ships of any other nation

1186 Sir CHARLES RUSSELL.—Certainly.

Senator MORGAN.—Not its own.

Sir CHARLES RUSSELL.—No, certainly not his own. We are talkin of public ships asserting the right of visitation against ships of anothe nation in time of peace.

This right is strictly a belligerent right, allowed by the general consent of nation in time of war, and limited to those occasions.

The undersigned avails himself of the authority and language of a distinguishe writer on international law:—We again repeat that it is impossible to show a sing passage of any institutional writer on public law, or the judgment of any court which that law is administered, either in Europe or America, which will justify th exercise of such a right on the high seas in time of peace independent of speci compact.

The right of seizure for a breach of the revenue laws, or laws of trade and nav gation of a particular country, is quite different.

The utmost length to which the exercise of this right on the high seas has ev been carried in respect to the vessels of another nation has been to justify seizi them within the territorial jurisdiction of the state against whose laws they offe *and* pursuing them in case of flight beyond that limit, arresting them on the oce and bringing them in for adjudication. This, however, suggests the Supreme Co of the United States, in the case before quoted, of the Marianna Flora, has ne been supposed to draw after it any right of visitation *or* search. The party in s case, seizes at his peril. If he establishes the forfeiture he is justified.

Mr. Justice HARLAN.—Sir Charles, suppose the case of a ve fitted out on the European side of the Atlantic Ocean, and loaded w

goods for the express purpose of smuggling them into the United States in violation of its Revenue Laws; would the language of Mr. Marcy go to the extent that the United States could only seize that vessel after it got within its territorial waters?

Sir CHARLES RUSSELL.—Certainly, the language would; but the case that you put is undoubtedly one of the most difficult cases that one has to consider,—the most difficult. You have a vessel as to which you have information such as you suggest, that she is coming to your coasts for the express purpose of violating your laws, but is outside your three-mile limit. Are you to allow her to take the chance of darkness on a coast imperfectly guarded and to run ashore her cargo in boats in violation of your Revenue Laws? That is a question I have had to consider, and it is one of enormous difficulty. If I may express an opinion to which no value is to be attached, it would be probable in such a case, if the Executive Authority had clear and decisive information of the character that you mention, she would probably do something before the vessel got within the three-mile limit, if it was proved to be necessary, relying upon the non-interference of the State to which that fraudulent vessel belonged not to make any complaint or raise any question whether the strict territorial limits had been exceeded.

Mr. Justice HARLAN.—Could a Court of the United States, sitting in judgment on that act, proceed on that ground?

Sir CHARLES RUSSELL.—I am a little puzzled as to that point, 1187 because of some of the assertions made by the Supreme Court Judges in the case of *re Sayward*. Undoubtedly there are some expressions in those judgments, as there were in the judgment of the Court below, which would seem to suggest a doubt whether, if the Executive assert that they do an act under and with the authority of a particular Statute, the Court will go beyond that assertion of executive authority. As, for instance, suppose the executive authority were to assert there was extra-territorial jurisdiction, or to say it was territory for the purpose of this executive act,—it seems to me doubtful, from some of the expressions I read, whether the Judges of the United States Court would consider themselves justified in going beyond the executive act to see if it was justified. Subject to that, if it came up in an English Court, I think it would be—

Mr. Justice HARLAN.—Troublesome?

Sir CHARLES RUSSELL.—Yes, troublesome; quite so.

The PRESIDENT.—In the case alluded to, if I understand it right, no Statute was invoked. They merely spoke of the action of the Executive without saying it was founded on a Statute. They said it was an action of the Executive, and it was out of their power to control it. That is what we call a separation of powers, and that is a little different from invoking a Statute.

Sir CHARLES RUSSELL.—Quite so; and they also did another thing; they said, this Act of Congress treats this as territory, and the Executive have invoked this Statute and put it in force as embracing and including and applying to territory, and we cannot go beyond that.

Mr. Justice HARLAN.—The President having interpreted the Statute by his act?

Sir CHARLES RUSSELL.—Yes.

Now, I have very little more to read; and as I shall not occupy the Tribunal very long to-morrow, perhaps I may be allowed to finish these citations before the Court rises. I want to show the continuity and consistency of these opinions. Mr. Cass, the Secretary of State, writes to Mr. Dallas on February the 23rd, 1859, apropos of a discussion as to

the right of visit not exisiting in time of peace, even in the case of a slaver.

The forcible visitation of vessels upon the ocean is prohibited by the law of nations, in time of peace, and this exemption from foreign jurisdiction is now recognised by Great Britain, and, it is believed, by all other commercial Powers, even if the exercise of a right of visit were essential to the suppression of the slave trade. Whether such a right should be conceded by one nation to its co-states of the world is a question for its own consideration, involving very serious consequences, but which is little likely to encounter any prejudiced feelings in favour of the slave trade in its solution, nor to be influenced by them.

Then President Grant, in the case of the "Virginius",—a ship flying the United States flag, seized on the high seas near Cuba, and the crew in a very high-handed way, shot—says in his Fifth Annual Message in 1873.

It is a well-established principle, asserted by the United States from the
1188 beginning of their national independence, recognised by Great Britain and other maritime Powers, and stated by the Senate in a resolution passed unanimously on 16th June, 1858, that American vessels on the high seas in time of peace, bearing the American flag, remain under the jurisdiction of the country to which they belong; and therefore any visitation, molestation, or detention of such vessels by force, or by the exhibition of force, on the part of a foreign Power, is in derogation of the sovereignty of the United States.

Finally, Mr. Evarts, to whom I have already alluded, a lawyer of great eminence, in reference to the seizure of United States ships by Spanish gunboats in non-territorial waters near Cuba,—I think there was a protest also on the part of Great Britain in reference to this matter; it was in relation to an assertion on the part of the Spanish Authorities extending 6 miles from the territory,—writes this:

It needs no argument to show that the exercise of any such asserted right [visitation and search] upon commercial vessels, on the high seas, in time of peace, is inconsistent with the maintenance of even the most ordinary semblance of friendly relations between the nation which thus conducts itself and that whose merchant vessels are exposed to systematic detention and search by armed force.

. . . . . .

This Government never has recognized, and never will recognize, any pretence or exercise of sovereignty on the part of Spain beyond the belt of a league from the Cuban coast over the commerce of this country in time of peace. This rule of the law of nations we consider too firmly established to be drawn into debate, and any dominion over the sea outside of this limit will be resisted with the same firmness as if such dominion were asserted in mid-ocean.

. . . . . .

But the distinction between dominion over the sea, carrying a right of visit and search of all vessels found within such dominion, and fiscal or revenue regulations of commerce, vessels, and cargoes engaged in trade as allowed with our ports to a reasonable range of approach to such ports, needs only to be pointed out to be fully appreciated.

Every nation has full jurisdiction of commerce with itself, until by treaty stipulations it has parted with some portions of this full control.

In this jurisdiction is easily included a requirement that vessels seeking our ports, in trade, shall be subject to such visitation and inspection as the exigencies of our trade may demand, in the judgment of this Government, for the protection of the revenues and the adequate administration of the customs service.

This is not dominion over the sea where these vessels are visited, but dominion over this commerce with us, its vehicles and cargoes, even while at sea. It carries no assertion of dominion, territorial and *in invitum*, but over voluntary trade in progress and by its own election, submissive to our regulations of it, even in its approaches to our coasts and while still outside our territorial dominion.

That is rather an ingenious suggestion in defence of the revenue jurisdiction upon another ground, namely that although the ship has not come into your actual territory, yet she is submitting to your regulations, even in her approach to the coast and while still out of territorial jurisdiction. I do not stop to defend it. I cite the passage for a different purpose.

Now I am quite content to stop here, though there is another matter I have to call attention to, namely, what is the true character of this doctrine of self-defence or self-preservation. I shall dwell for a few minutes upon it, in order to refer to one writer of authority, and
1189 of acknowledged eminence. I mean Mr. Hall in his book upon International Law.

The PRESIDENT.—Will you please yourself about that, Sir Charles.

Sir CHARLES RUSSELL.—Then with your permission, Sir, I will take it to-morrow, and I will take it very shortly.

[The Tribunal then adjourned till to-morrow at 11.30.]

THIRTIETH DAY, MAY 31ST, 1893.

Sir CHARLES RUSSELL.—Mr. President, I wish to begin by cor ing an error into which I seem to have fallen a few days ago. At 762 of the Print I find that I uttered an economic heresy. I was ing with the question of the economic effect of the tax imposed b United States, upon each sealskin brought into its territory, a think I did misconceive the economic effect of that imposition. error, which I now wish to acknowledge, was kindly pointed out t at the time by certain questions addressed to me by you, Mr. Presi by Mr. Justice Harlan, and by Senator Morgan.

Another matter I also wish to set right is this. You will recc Mr. President, that I was referring to the fact of the length of tim the extent of territory over which the Hudson's Bay Company h many years carried on the business of collecting the skins of fur-be animals of all kinds including fur-seals, principally through the a of the native population. In that correction, I stated, more w than the facts justified me, the extent of Alaskan territory whic Hudson's Bay Company in point of fact leased from the Ru Company.

I have now ascertained what the precise facts are; and it amou this, that the lease which the Hudson's Bay Company had was o part of the Alaskan territory which we have been calling, for bre sake, the *lisière*, or margin of coast south of the Aleutian Chain. facts are that, in 1839, the first lease was granted for a payment in consisting of, among other things, 2,000 otter skins, and certai plies of food, and other commodities. That was a lease for 10 It was renewed from time to time; in 1849, in 1853, and finally c ued, under one or other agreement with the Commercial Company, to the time of the cession of Alaska by Russia to the United Sta 1867. Now, with these two corrections, I pass on to the conclus my Argument.

Mr. PHELPS.—I beg your pardon, I did not understand the fir that you desired to correct.

Sir CHARLES RUSSELL.—It is unimportant in the consideration general question. I only wanted to set myself right with the Tri It was the suggestion that the imposition by the United States tax now amounting to some 42 shillings per skin, affected econon the price in the market. That was the point.

Now I pass on to the conclusion of this very long discussion.

yesterday that upon this subject of the rights of self-defe
1191 self-preservation, as they are indifferently called, I desi
refer to one modern authority who is in complete agreemen

every textwriter whom I have had the opportunity of consulting. are none so far as I have been able to discover that differ from hi

I have examined among others Kent, Martens, Manning, H Wheaton and Twiss, and I find no discrepancy of opinion upo subject to which I am now addressing myself, namely, what ar

ights of defence, and of preservation, properly so called. The chap-er which I desire to refer to particularly is in a book treated, and leservedly treated, as a book of authority in our English Courts, a book as to which I have to make my own acknowledgments of its practical utility in the actual business of my profession; I mean the Treatise of Mr. Hall. Upon consideration, Mr. President, and regarding the very serious demands that I have made upon the patience of this Tribunal, I have not thought it right to trouble you at this stage with any lengthened citation from it. I will, however, attempt briefly to summarize what is the principle, and the limitation of the principle, which he lays down in this connection. He deals with these right of self-defence and self-preservation on the same principle precisely, as Mr. Webster did in that despatch in relation to the "Caroline," which I have more than once referred to, that is to say, as rights which spring into existence in cases of grave and serious emergency, the occasion only covering what is essentially necessary for immediate protection. It applies to cases only where there is no opportunity of remonstrance to the other nation against whom those acts are directed; that these acts may generally be treated by the nation against whose nationals those acts are directed as a *casus belli;* that they are not rights in the legal sense of the term, but are in the nature of belligerent or quasi-belligerent rights; and lastly that they are to be resorted to only if other means, diplomatic representations and the like, have failed.

I will only read one sentence in justification of that last which is an important point. He says:

> As in other cases the danger must be serious and imminent, and prevention, through the agency of the State whose rights are disregarded, must be impossible.

One observation I should like to make which I had intended yesterday to make in connection with the case of *Church v. Hubbard* with which I dealt at length, and as to which I also cited the comment and criticism of Mr. Dana in his edition of "Wheaton's International Law". My learned friend, Mr. Carter, referred to an *obiter dictum* of Chief Justice Cockburn in the celebrated case of the Queen *v.* Keyn, as though it added force or authority to the expression of opinion of Chief Justice Marshall. The Chief Justice Cockburn was not concerned in considering the question of the limitation of rights internationally considered at all. He was concerned with the question
[192 which I endeavoured to explain yesterday whether, according to the law of England, although the three-mile zone was internationally regarded as part of the territory of the country, it could be so regarded as to bring it within the area of the criminal jurisdiction of the country without express legislation; and it was therefore merely incidental to the consideration of that question that he refers to the authority of, among others, Chief Justice Marshall, an authority which I do not dispute. The learned Judge's dictum was addressed to the case of an invasion of the revenue law; and although the seizure in that case was at a greater distance than, I think, has ever been recognized as within proper limits by any other Judge, yet it is to be observed that Chief Justice Marshall was not considering the question as between a nation asserting the right and a nation resisting the right, but was merely called upon to determine in that particular case whether the risk of the seizure which, in fact, took place, was or was not a risk contemplated by the parties within the meaning of a particular contract of insurance.

Now I think I have come to the end of the citation of authori and I wish to put the points finally as they come up for adjudica by this Tribunal.

First, as to the seizures, I have argued the question whether or those seizures could be justified upon any principle recognized by in national law and I have endeavoured to establish—I hope I have cessfully established—that they cannot be so defended. It is a fac which I have not previously called the attention of the Tribunal t when in their Counter Case the United States are called upon to jus those seizures, they justify them upon one ground, and upon ground only.

If you, Mr. President, will be good enough to turn to page 13 the Counter Case you will see what I mean. On the previous page they have admitted the seizures as to some vessels, and the order expulsion from Behring Sea in prohibition of sealing as regards o vessels, and in the next page they proceed to justify those seizu the marginal note being "Reasons why seizures made".

The United States charge that each and all of the vessels when so seized engaged in the hunting of fur-seals in the waters of Behring Sea in violation o statutes of the United States, and that such seizures were made in accordance the laws of the United States enacted for the protection of their property int in the fur-seals which frequent Behring Sea and breed only upon the Pribilof Isl which Islands are part of the territory of the United States, and that the ac the crews if permitted would exterminate the Alaskan seal herd and thereby de an article of commerce valuable to all civilized nations.

You will see therefore that in their Counter Case there is no sug tion of that contention, which I may have to say a final word or about, that these provisions, although there is no justification them, as Mr. Carter admitted, as a statute, may yet be treated defensive regulations.

1193 That is an idea which is attributable to the ingenuity of learned friends and which appears developed for the first t in the printed Argument, but does not appear in the Case, or, as I l said, even in the Counter Case.

Now, Senator Morgan yesterday made a suggestion to the effect these were mere acts in defence of property; but I would point out the acts complained of were of three kinds; first, as regards ve engaged in sealing, next as regards vessels that had been engage sealing, and, lastly, as regards vessels equipped for the purpos being engaged in sealing.

And I have to point out that while, if the fur-seal is to be treate an article of property, there is, the right to defend it in the high s it is attacked,—while I concede that, what lies upon my learned fri to show is that even if there is such property right, the conse nations has been given, and that international law has sanctioned other than the ordinary right of defence of possession which belon an individual owner of property; and if it be objected that, in the of the fur-seal, the property is of so volatile a kind that that mere of defence of possession would be inadequate, I answer, first, tha very circumstance of it being of so volatile a character goes some w show how impossible it is to conceive the idea of property in it. in the next place, I have to say that the volatile character of the p erty cannot alter the rights, internationally recognized, in regard t any more than in the case of a great frontier or an extended c which needed to be defended by an adequate Police-force in ord prevent a violation of its Revenue Laws,—any more than in su case it would be admissible for the Power possessing that frontier,

desiring to save the expense of adequately guarding it, to resort to extreme, or cruel, or violent measures in order to strike terror into possible offenders, and prevent the invasion of that frontier line for illicit purposes. It is a proposition which needs a justification that authority does not give it;—that even if an item—because the principle must go that length,—of the property of a nation, however unimportant in value, is seized, it will justify that nation in seizing upon the high seas, the ship in which this property is, and in condemning that ship. Some warrant in international law must be shown in support of so serious a proposition.

I will put the case in this way, and I invite my friend Mr. Phelps' attention to it when he comes to address you: it is conceded for the purpose of justifying what are the international rights, and what are the international sanctions attached to those rights, that the municipal statute may be treated as if it did not exist—that it may be rubbed out of the record. And now my friend will have the opportunity of telling us to what form of libel he, as a lawyer (if that municipal statute did not exist) could put his name, and which he would maintain in argument before Judges, which could justify the action which has taken place in regard to these ships belonging to Great Britain.

1194 I have dwelt—I do not intend to recur to it—upon the fact that from the first to the last the proceeding has been based upon the municipal statute, for breach of the municipal statute, and for breach of the municipal statute alone. I wish to say a word or two about the point of whether it is possible, now, to turn this municipal statute (even if there were international warrant for the sanction it contains), into a self-preservative regulation.

Now, Mr. President, I submit that the contention that a Government, proceeding upon a municipal statute, invoking the aid of its municipal Judge to enforce that statute, charging the British subject libelled with an offence against that statute and against that statute alone, should now be heard to say that it can justify its proceedings as an offence against international law, is a very startling proposition. But it is still more startling that a Defendant who has been libelled—whose ship has been confiscated and confiscated upon the ground that he had committed an offence against the municipal statute, is now to be told that he is charged with, and his property confiscated upon the ground of, an international offence of which he was never informed, and which he was never called upon to answer. And, lastly, the proposition is still more startling when you consider the attitude of a Government towards the Judge of its own Court. It appeals to that Judge to put in force the municipal statute; it asks his aid upon the ground that an offence has been committed within the area to which that statute relates. The judge proceeds upon that basis; he considers the question in that relation alone, and yet we are to be told that he was acting as an international Judge—as Judge of a war Tribunal—although he did not know it: that he was dealing with and proceeding upon the basis of great principles of international law which closely touch the sovereignty of nations and the peace of the world, although his judgment shows that he had not in his remotest apprehension the consideration of the most elementary principles of international law itself. No, Mr. President, this matter rests, must rest, for its justification upon the grounds which they have put forward and put forward with so much deliberation—the grounds taken in the diplomatic correspondence, the grounds taken in their libel in Court, because the Tribunal will not forget the emphatic

statement of counsel to which I have previously adverted, that after stating their case founded upon the assumption of territory, basing the assumption of that territory upon the derivative title from Russia, their argument and libel conclude with the emphatic words:

> Such is our understanding of the law, such is the record; upon them the United States are prepared to abide the judgment of the Court and the opinion of the civilized world.

I have only in this connection one other concluding remark to make—it touches a subject to which I have previously frequently adverted.

It is to point out that no instance can be cited, which I am aware
1195 of, in which the provisions of a municipal statute intended to operate—avowedly intended to operate—as a statutory authority and a statutory authority only, has ever been treated as a self-defensive, or as a selfpreservative, regulation. Indeed, when you come to consider the principle to which I have just adverted—the principle of sudden danger and emergency, leaving no opportunity for consideration or device of means—you cannot fail to determine that the notion of an elaborate and carefully prepared Code of punishments is inconsistent with the notion of what a Nation may do in its sudden emergency: and it is, as Mr. Webster well put it, that very consideration which lies at the basis of this whole doctrine of what a nation may resort to in the case of sudden emergency.

Now, I have done with this, and I leave the subject; but I wish to paint out that, except as regards what has taken place, namely the seizures, this question is of no future practical importance for the reason which I will make apparent in a moment. It is necessary to consider it in relation to the question of the unwarrantable character of the seizures; but, if this Court were to affirm a right in the United States in relation to the fur-seals, I need not tell this Tribunal that the question of what international rights of protection the United States possess, would become practically immaterial, because Great Britain would be bound, in good faith, to respect the affirmation of any right which this Tribunal declared to exist, and to enjoin upon its nationals the avoidance of any disturbance of that right. Therefore, except as regards the past seizures the question is one of relatively small importance.

I have thought it right to argue this question of what are the rights of protection even on the assumption that there was a *right* to protect; but, of course, I have but ill-succeeded in my task if I have not conveyed to this Tribunal that the main stress and burden of my argument has been addressed to the denial of any such right in whatever form that right is suggested. In connection, therefore, with the seizures, I have, with the assistance of my learned friends, framed the questions of fact which we submit this Tribunal may properly be called upon to answer in the manner which I am now about to take the liberty of suggesting. They have been shown to my learned friend Mr. Phelps, and although his opportunity of considering them was limited, and I do not consider him debarred in any way from criticising them when he has more time for deliberation, I think I am justified in saying that so far as he has read them they do not deal with anything except facts which are not in dispute.

Mr. PHELPS.—I ought to say, perhaps, in justice to Sir Charles, that I made an observation that quite justifies what he has just said in respect of these statements. On another perusal, I think that perhaps one of these statements may be open to criticism, and therefore it is

only fair to state, now, the only point we shall make in respect of them. We conceive—

Sir CHARLES RUSSELL.—I think my friend had better reserve that. I will read them and presently you can have an opportunity of stating your view.

1196 Mr. PHELPS.—Certainly, unless it is your convenience.

Sir CHARLES RUSSELL.—Thank you, I do not think so. I have said my friend is not in any way estopped from criticising them, but I think it will be found that they will not be open to any objection as to raising any fact not in dispute. It is quite right that this Tribunal should be relieved, as far as possible, from determining questions of fact. For instance, it is suggested in the United States Case that some of the ships were really owned by United States citizens, and that therefore, as these men were offending against the laws of their own country that they ought not to be compensated for the loss of their ships.

That is, of course, a perfectly legitimate point to raise. We do not think, in point of fact, it is well founded, and it happened that one of these reputed owners was in Paris a few days ago—I believe is still—and we suggested to our friends whether it might not be a convenient opportunity for getting his examination and cross-examination taken upon this question before a commissioner; but my friends—I make no complaint of it—thought that was hardly a mode of precedure contemplated by the Treaty, so that any question of fact of that kind must be left open to either party to prove or to dispute at the convenient time when the subsequent question of liability and the measure of liability are in question.

Lord HANNEN.—Unless I am mistaken it is a question of fact that neither of you call upon this Tribunal to decide?

Sir CHARLES RUSSELL.—That is so.

The only facts we call upon the Tribunal to determine, are those which I will not take the liberty to read.

The British Government having submitted to the Arbitrators certain questions of fact as involved in the claims for damages set forth in the Schedule to the British Case, pages 1 to 60 inclusive, ask for the following findings thereon, namely:

1. That the several searches and seizures, whether of ships or goods, and the several arrests of masters and crews, respectively mentioned in the said Schedule, were made by the authority of the United States Government.

2. That they were made in non-territorial waters.

3. That the several searches, seizures, condemnations and confiscations whether of ships or goods, and the several arrests fines and imprisonments, were for alleged breaches of municipal laws of the United States, which alleged breaches were wholly committed on the high seas outside the territorial waters of the United States.

The PRESIDENT.—You do not consider that is undisputed—just that point.

Sir CHARLES RUSSELL.—I confess I think it is undisputed. I think it cannot be denied that the several searches were made, the seizures were made, the condemnations were made, the confiscations were made, as for breaches of municipal law.

Mr. CARTER.—There is an implied statement there which we deny.

Sir CHARLES RUSSELL.—I think, as a matter of fact, it cannot be denied—I think it is correct.

The PRESIDENT.—I do not believe it is undisputed.

1197 Sir CHARLES RUSSELL.—It is difficult to say what is not disputed. My friend Mr. Carter says there is something implied here, which is not admitted.

Mr. CARTER.—We will present our view of it.

Sir CHARLES RUSSELL.—Quite so.

Then 4th:

That the several orders, mentioned in the said Schedule, whereby ships were prevented from pursuing their voyages, were given on the high seas outside territorial waters under the authority of the United States Government and in execution of the municipal laws of the United States; and

5. That the said several searches, seizures, condemnations, confiscations, fines, imprisonments and orders were not made imposed or given under any claim or assertion of right or jurisdiction except such as is submitted to the decision of the Arbitrators by the questions in Article VI of the Treaty of Arbitration.

That I think covers the whole ground. At all events we will take the opportunity of handing a copy of those questions to the members of the Tribunal.

The PRESIDENT.—You imply, by that last question, that we are perfectly competent to decide all the questions of law which are involved by the seizures?

Sir CHARLES RUSSELL.—This is a question of fact which we are asking you to find. We are asking you to find that, in fact, the seizures, condemnations, and confiscations, were not made except upon a claim or assertion of right covered by the Treaty. The 5th finding proposed is practically intended to assert, as a fact, that the grounds upon which it is even now sought, (whether by municipal statute, or self-defensive, or self-preservative regulations) are covered by the Treaty. About that, I think there is no room for doubt.

The PRESIDENT.—May I, once more, put the same question on that: Do you believe that that fifth question of yours is undisputed?

Sir CHARLES RUSSELL.—Absolutely, I think: although, as I said just now it is very difficult to say what is not disputed. I cannot conceive that it can be disputed: because its dispute would mean this—that there is some ground behind, which has never appeared in the whole course of these years and is not adverted to either in the correspondence, the Case, Counter Case, or Argument upon which the United States can justify what it has done,—and which has not been submitted to this Tribunal.

The PRESIDENT.—Perhaps Mr. Phelps will be kind enough, in his turn, to tell us whether he accepts this, or whether he intends to dispute it.

Mr. PHELPS.—Certainly.

Sir CHARLES RUSSELL.—Now I wish to get on, with the permission of the Tribunal. I wish to relieve, and am glad to relieve, the Tribunal of one question at all events, and that is the question of damages under Article V of the *modus vivendi* of 1892, which is also remitted to this Tribunal. This, Sir, will not need any troublesome reference, because it is an admission I am going to make. At page 216 of the printed Argument of the United States (you need not, Sir, trouble to
1198 refer to it, if I may be permitted to say so, because it is not a point of difference between us—it is a matter I am clearing out of the way)—the United States give up any claim to damages under that Treaty; and I have to say, on the part of Great Britain, and speaking with authority in the matter, that although they had under the earlier *modus vivendi* to pay a very large sum for damages to their Canadian sealers—a sum I think exceeding $100,000—looking to the fact nevertheless, that under the *modus vivendi* in question a great many, at least, if not all of the sealers who would have resorted to the eastern part of Behring Sea had made catches of seals in other parts of the ocean, and although I think it might be argued that this Tribunal

is required by Article V to give damages on the basis of a limited catch or catches which might have been taken in Behring Sea—in all the circumstances of the case Great Britain does not desire to press that view upon the Tribunal, and therefore, will ask for no finding for damages upon and under that 5th article of the *modus vivendi;* but it probably will be convenient in the Award which the Arbitrators may think proper to make, to state upon its face that both the United States and Great Britain have abandoned any claim for damages under that head.

The PRESIDENT.—You are agreed also as to that, Mr. Phelps.

Mr. PHELPS.—Yes.

The PRESIDENT.—I am not quite sure, speaking for myself, that the question of compensation was referred to the Arbitrators. I am not quite sure that Article V is to be construed in that way as to compensation.

Sir CHARLES RUSSELL.—If we agree to relieve you of it, Sir, it is unnecessary to discuss it.

The PRESIDENT.—Of course, it is more easy to agree about a difficult question than to have it decided by us.

Sir CHARLES RUSSELL.—Now, Sir, I come to the important questions in the case. As regards those questions, my respect for Senator Morgan induces me to say one word. Senator Morgan has more than once, as I understood, suggested that the answers to the five points, as they are set out in Article VI, do not exhaust the duty and functions of this Tribunal as to the questions in dispute submitted to this Tribunal for adjudication. Well, if that be so,—if Senator Morgan be right in that—I need not say it would be the duty of this Tribunal to consider any question referred to them under the whole Treaty if it is not found to be dealt with, and met by, the answers to those five points. But, as I submit respectfully to Senator Morgan, they are adequately dealt with as the result, or by the result of the answers of the Tribunal to each of those questions. For instance, Senator Morgan was good enough to refer me to the introduction to the Treaty, and to the first Article of the Treaty which repeats the introduction; namely, that, amongst the questions which have arisen between the two Governments, there are some which concern the jurisdictional rights of the United States in the waters of Behring Sea; others which concern the preservation of the fur-seal in or habitually resorting to the said Sea; and others
1199 again which concern the rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the Behring Sea.

Now I think, if the learned Senator will consider, he will see that every one of those questions will be in fact dealt with by the answers to one or other of those five questions. For instance, in determining what the exclusive jurisdiction if any Russia had, what recognition there was of this exclusive jurisdiction by Great Britain, whether Behring Sea was included in the phrase "Pacific Ocean", and the effect of the cession of the rights of Russia to the United States—the determination of these matters will dispose of the class of questions which have been grouped together as jurisdictional or territorial questions.

And then as to the question of the right of the United States as to property or protection in the fur-seal: equally the answer to that question would seem to me to dispose of the question, What were the rights of the respective nationals? because if the United States citizens have no exclusive or exceptional right, then the great and broad principle remains—we care not whether it is stated on the face of the Award or

not, the Award will give it no greater sanction—that all men are equal on the high sea and have the right to take from it the products of the high sea according to the measure of their opportunity and their will. Thus the whole question of the respective rights will have been determined. But if I should not be right in that, the Tribunal will themselves judge, and they will frame their answers so as to cover the view which has been suggested by Senator Morgan. I content myself, therefore, with reminding the Tribunal that at page 26 of the printed Argument, we have formulated the answers which we conceive the facts and the law justify us in calling upon this Tribunal to make. These relate to the first four of the questions.

First:

That Russia exercised no exclusive jurisdiction in Behring Sea prior to 1867; that, in 1821 only, Russia asserted exclusive jurisdiction over a part of Behring Sea along its coasts, but that she withdrew the assertion, and never afterwards asserted or exercised such jurisdiction.

That Russia exercised no exclusive rights in the seal fisheries in Behring Sea prior to 1867; that in 1821 only, Russia claimed exclusive rights, as included in her claim of jurisdiction extending to 100 miles from the coast, but that she withdrew the assertion, and never afterwards asserted or exercised such rights.

The only exclusive right which Russia subsequently exercised was the right incidental to her territorial ownership.

Then as to question 2:

That Great Britain neither recognized nor conceded any claims of Russia of jurisdiction as to the seal fisheries, *i. e.*, either (*a*) of exclusive jurisdiction in Behring Sea, or (*b*) exclusive rights in the fisheries in Behring Sea, save as already mentioned.

Mr. Justice HARLAN.—What do you mean by "exclusive rights in fisheries in Behring Sea?" You do not include the business
1200 conducted on the Islands, do you? Do you mean that Great Britain did not concede Russia's exclusive right on the Islands?

Sir CHARLES RUSSELL.—Not at all; we are not dealing with the rights *ratione soli:* those are not in dispute. We deny the existence of any exclusive rights outside territorial limits. Our contention is that the only rights which Russia had or exercised were such rights as were incidental to her territorial ownership.

Lord HANNEN.—The words are, "save as already mentioned".

Sir CHARLES RUSSELL.—That is so. The form of the Treaty is curious. It may have escaped notice that the first question in Article VI deals with exclusive rights in the seal fisheries, and therefore we have adopted the language of the question; whereas question N°. 5 alters the phraseology and says "protection or property in the fur-seals". The answer, therefore, is adapted to the phraseology of the question.

Now for the third answer, (which Mr. Blaine told us would be decisive of the matter), we contend that the answer should be:

That Behring Sea was included in "Pacific Ocean" in the Treaty of 1825.

That Russia neither held nor exclusively exercised any rights in Behring Sea after the Treaty of 1825, save only such territorial rights as were allowed to her by international law.

Then the answer we suggest to question 4 is:

That no rights as to jurisdiction or as to the seal fisheries in Behring Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th March, 1867, passed to the United States under that Treaty, except such as were incidental to the islands and other territory ceded.

In other words, that no more passed (and it is not contended that more did pass to the United States) than Russia possessed, and that Russia's rights were the rights of a territorial owner and no more.

There will then remain the 5th question, the answer to which is formulated on page 63 of the printed Argument, thus:

That the United States have no right (*a*) of protection, or (*b*) of property in the seals frequenting the islands of the United States in Behring Sea when they are outside the ordinary three-mile limit.

Now, I have only one other word to say. I have been dealing solely with the question of legal right; I have not said one word, nor shall I say one word, in this connection, with a matter entirely distinct, to be approached from an entirely different standpoint,—the question of Regulations. I will only say what I have previously said, what the correspondence of the representatives of Great Britain justifies me in saying, that Great Britain is now, as she has always professed to be, ready to consider the question of Regulations upon a fair basis,—upon the basis of a common interest to be safeguarded.

Very little remains now for me to say, Mr. President. I have to submit that in none of the forms in which this claim has been presented, shifting and varying as they have been, is that claim maintainable in point of law, whether it is to be regarded as a claim by derivative title from Russia which was the case originally put forward,
1201 but which has now been allowed to recede largely into the back ground: or whether it is a case of property in the individual fur-seal or in the fur-seal collectively, or in an industry said to be founded on the fur-seals with, or apart from, a claim of property in the fur-seals themselves.

In every form in which it can be put, or in which human ingenuity can suggest that the claim can be put, we submit that it is untenable. It is opposed to that great principle which lies at the very root of this whole controversy, the principle of the freedom of the sea, the principle that upon the sea the ships of all nations are equal, whether they be ships of a great power or ships of an insignificant power; the principle that upon the high sea the ships of each nation are part of the territory of that nation; the principle that upon the high sea the nationals of every nation can take at their will, at their pleasure, according to their ability, from the products of the sea.

And, Mr. President, it is no light matter that this is the first time in the history of the world that any nation, or any individual of a nation, has ever claimed a right of property in any free-swimming animal in the ocean, that this is the first time in which an exception has been sought to be made in the case of the fur-seal from the right of all mankind to take from the ocean the fish and the animals that it contains.

The advancement of these propositions is grave enough; still graver the sanctions which are invoked, forsooth, in the name of international law for the vindication and for the defence of these extravagant and unfounded pretensions. For what are those sanctions? They are the affirmation of the right on the part of the United States, and for all time, to search, to seize, to condemn, vessels of a friendly Power engaged in pelagic sealing or about to engage in pelagic sealing, or which have been engaged in pelagic sealing and to take from them the seals that they have acquired, or to drive them from the waters, with a show of force, to the ports from which they sailed. In other words, it is no less than this—the assertion in support of this supposed right of those acts of high authority on the high seas which are only permitted by international law to belligerents, or only allowed to be exercised against pirates with whom no nation is at peace.

Mr. President, I have endeavoured to argue this question with as much closeness of reasoning as I could command. I have not indulged in

vague speculation, nor embarked upon metaphysical discussion. I have felt it to be my duty to try and assist the Tribunal in ascertaining what the Law is, because, as I have previously taken the opportunity of saying I conceive it to be the function of this Tribunal not to make a law but to declare the law; not to consider what the law ought to be; but to say, upon their responsibility, what the law is,—not to formulate new rights, but to affirm what, in their judgment, they believe to be existing rights.

In this domain of law, the armoury of argument is full. Here, indeed are the weapons of Achilles; but where are the strength and skill to use them with their full force and effect?

1202 I have dealt with the law as I believe it to be. I am content to think that that law, as it has come down to us, fashioned by the wisdom of ages modified by the experience of Human Society, in its evolution is a fitting and noble instrument to serve the just purposes and uses of Mankind in the adjudication of their rights.

My friend, Mr. Carter, in his impressive opening, well said that this submission to arbitration was a great fact. Mr. President, it is a great fact—a fact of weighty moral significance.

There are two great Powers before you: One, a representative of the civilization of the Old World, great in its extent of dominion, greater still in its long enduring traditions of well-ordered liberty and in the stability of its ancient Institutions; the other a young but stalwart member of the Family of Nations, great also, in its extent of territory, in the almost boundless resources at its command, great, too, in the genius and enterprise of its people, possessing enormous potentialities for good on the future of the human race. These Powers are in difference. Great Britain conceives that she has been wronged by these seizures, as we submit justly so conceives, that her sovereignty has been invaded; her rights upon the high sea, represented by her nationals, set at nought. Happily the dread extremity of war was avoided. These nations have not sought to turn their ploughshares into swords to settle their differences. They are here before you, friendly litigants, peaceful suitors in your Court, asking by pacific means the adjustment and the determination of their rights in times of peace. This is, indeed, a fact of great moral significance.

Peace hath her victories not less renowned than war.

This arbitration is, who will gainsay it? who can gainsay it?—a victory for peace. Will your award be a victory for peace? You, Gentlemen of this Tribunal, alone can answer.

It will be, it must be, a victory for peace if, as I cannot permit myself to doubt, it conform to and leave untouched and undoubted the principles of that law which have been consecrated by long usage and stamped with the approval of generations of men: that law which has, after all, grown up in response to that cry of humanity heard through all time, a cry sometimes inarticulate, sometimes drowned by the discordant voices of passion, pride, ambition, but still a cry, a prayerful cry, that has gone up through all the ages, for peace on earth and good will amongst men.

The PRESIDENT.—Sir Charles, we have to thank you for the great pains you have taken in making clear the very intricate questions brought before us for decision. You have reaped so much applause in the course of your profession as a lawyer and far-famed speaker, that what I might add would be but of small purport. I will merely say that the vigour and incisiveness of your argument have been fully appreciated. We feel that England has done honor to this Tribunal when she chose as her counsel in this memorable case one of her ablest and most powerful legal debaters.

ARGUMENT OF SIR CHARLES RUSSELL, Q. C., M. P., HER BRITANNIC MAJESTY'S ATTORNEY GENERAL.

TABLE OF CONTENTS.

I.—20TH DAY; MAY 10TH.

	Page.
General consideration of the Case	723
Changes of front in the United States position	725
General propositions maintained by the United States	727
View of the United States as the nature of International Law	729
Grotius' doctrine of "*Placuitne gentibus*"	730, 1038
Importance of subject to mankind overrated by the United States	733
The Seal Fisheries not an important factor in the purchase of Alaska	734
Destruction of the seal may be necessary	743
Exaggerated view of pelagic sealing taken by the United States	745
True nature of management and killing on the Islands	747
United States criticism of Canadian position	757
United States criticism of British Commissioners	758
Position taken up as to Indians inconsistent with general argument of the United States	761

II.—21ST DAY; MAY 11TH.

Novelty of claim of the United States	764
Writers in the United States who have opposed the claim	765
Order of the Argument set forth	773
The seizures of British vessels	773
Meaning of liability in Article VIII of Treaty	773
The facts of the seizures	786
Correspondence on the seizures	789
Mr. Bayard's opinion on the seizures	795
First appearance of the "*Contra bonos mores*" argument	803

III.—22ND DAY; MAY 12TH.

Mr. Blaine's reply to Lord Salisbury's answer to the *contra bonos mores* despatch	808
History of the United States Legislation dealing with Alaska	812
The Revised Statutes of Alaska; section 1954	813
— — — — section 1956	816
The Statute of 1889	822
Report of the Committee of the House of Representatives	824
Proceedings in the Alaskan Court	828
Transcript of the Record	828
Copy of the Brief filed by the United States Counsel	831
Report of the Governor of Alaska for 1887	841
Judgment of Judge Dawson	845
Distinction between Prize Courts and Municipal Courts	849
Examination of the first four Questions of Article VI	854
The forged translations of Russian documents	857

IV.—23RD DAY; MAY 16TH.

Argument and Judgment in the "Sayward" case	864
Description of the Behring Sea	869
The Ukase of 1799	870
The Ukase of 1821	872
Nature of the claim made in the Ukase of 1821	877
Protest of the United States	879

Page

The United States Treaty of 1824 88
The Baron de Tuyll incident 891, 91
The British Treaty of 1825 89
The British protest to the Ukase of 1821 89

V.—24TH DAY; MAY 17TH.

Consideration of Treaty of 1825 91
Position assumed by the United States in the case of the "Loriot" 91
Nature of the exclusive right in the Seal Fisheries exercised by Russia 92
The Fifth Question 9
The question raised by Question 5 is one of exclusive jurisdiction in Behring Sea 9
Exclusive jurisdiction in a defined area cannot exist apart from territorial dominion 9

VI.—25TH DAY; MAY 23RD.

Assertion of property in the "herd" examined 9
Sealing by the Indians 9
Examination of the nature and habits of the Fur-seal 9
Animus revertendi 968, 10
The case of little "Jimmy" 9
The question of the intermingling of the "herds" 9
Examination of the Furriers' evidence 9
The alleged tameness of the Seal considered 9
Mr. Carter's two propositions as to property in wild animals considered 9
Wastefulness of pelagic sealing irrelevant to decision of the question of property 9

VII.—26TH DAY; MAY 24TH.

Appointment of Mr. Elliott by Congress 1000, 1
Examination of assertion that there is only a right to the usufruct of property 1
Examination of Authorities 1
Cases cited by the United States.
The case of the Swans 1012, 1
Child v. *Greenhill* 1
Keeble v. *Hickeringill* 1013, 1
Amory v. *Flyn* 1
Goff v. *Kilts* 1015, 1
Blade v. *Higgss* 10
Morgan v. *Earl of Abergavenny* 1019, 10
Davies v. *Powell* 10
Hannam v. *Mocket* 10
Additional Authorities cited by Great Britain 102
Gillet v. *Mason* 102
Boulston's Case 102
Ibbotson v. *Peak* 102
French Law as to wild animals 103
The Appeal to International Law 1037

VIII.—27TH DAY; MAY 25TH.

Royal property in Swans and Fish 1043
Examination of Mr. Phelps' Argument 1045
Judgment in the "Sayward" case 1047
Position of Malice in the enquiry examined 1055
Mr. Phelps' dynamite illustration considered 1058
The rights in an "industry examined" 1062
Copy and Patent rights 1068
Examination of the argument as to the right of protection 1072
The case of the "Trent" 1074
The "Hovering" Acts 1076, 1078
Church v. *Hubbart* 1076
Pursuit of vessels out of territorial waters 1079
The true limit of self-defence in time of peace 1081
Examination of examples of acts of self-defence cited by the United States 1082
Amelia Island 1082
The "Caroline" 1085, 1089

IX.—28TH DAY; MAY 26TH.

Examination of Mr. Phelps' argument—Continued. Page.
Examination of examples, etc.—Continued.
The Appalachicola River 1090
Greytown 1092, 1125
British Orders in Council in 1809 1093
The Newfoundland and Novia Scotia Fisheries 1094
The Quarantine Act of Great Britain 1105
Examination of the statement that right of search is not confined to time of war 1107
British claim of 1812 to search United States ships for British subjects 1107
Revival of the question in 1858 1110
Proposals for Convention for mutual rights of search among European Powers in 1862 1115
Examination of extract from Azuni 1120
— — Mr. Phelps' analogical illustrations 1122
Treaty for protection of submarine cables 1123
Examination of British and Foreign Legislation cited by United States as analogies supporting United States action 1126
Falkland Islands 1128
Principles of Legislation by British Colonies 1132, 1136

X.—29TH DAY; MAY 30TH.

New Zealand 1137
Cape of Good Hope 1138
Canada 1135
Newfoundland 1142
Greenland or Jan Mayen Fisheries 1144
Principles on which fishery conventions are based 1145
Russia 1145
Uruguay 1152
Chile 1152
Argentine Republic 1153
Japan 1154
Irish oyster fisheries 1154
Scotch herring fisheries 1156
Ceylon pearl fisheries 1156
Australian pearl fisheries 1157
France 1158
Italian coral fisheries 1155
Norwegian whale fisheries 1160
Panama 1161
Mexico 1163
General principles of International Law applicable to the argument from analogy of the above legislation 1163
Territorial nature of British legislation 1164
The St. Helena Act of 1815 1167
Chief Justice Cockburn on the necessity of consent of nations to International Law 1171
Church v. *Hubbart* 1172, 1191
Rose v. *Himely* 1175
Hudson v. *Guestier* 1176
Dana's note to Wheaton on these cases 1177
Hovering Acts 1180
Judgments in "*Le Louis*" "*The Antelope*" "*The Apollon*" "*the Marianna Flora*" "*La Jeune Eugénie*" "*Buron* v. *Denman*" 1182
Opinions of United States Presidents and Secretaries of State on the belligerent nature of the right of search 1185

XI.—30TH DAY; MAY 31ST.

Hall on the right of self-defence 1191
Examination of argument that an extra-territorial statute may be treated as a defensive regulation against foreigners 1192
Submission on behalf of Great Britain of proposed findings of fact 1196
The question of damages under *modus vivendi* of 1892 1197
Answers to the five questions proposed by Great Britain 1199
Conclusion 1200

FUR-SEAL ARBITRATION.

ORAL ARGUMENT

OF

SIR RICHARD WEBSTER, Q. C., M. P.,

ON BEHALF OF GREAT BRITAIN.

THIRTIETH DAY, MAY 31ST.

Sir RICHARD WEBSTER.—Mr. President, if I were to obey the dictates of my own inclination, I should state at once frankly to the Court that it was not in my power to assist them by fresh or additional observations in following, or attempting to follow, the argument that has been addressed to you by my learned friend, the Attorney General. I say it without the slightest shadow of reservation; I am not aware of a single point that has not been touched, or of a single ground that has not been urged, or of any substantial principle upon which the United States Case is based, which my learned friend has not attempted to attack and grapple with.

And yet, Mr. President, in all probability, I should not be altogether fulfilling my duty if I were to remain absolutely silent in connection with this discussion before this Tribunal. Having been chiefly responsible for the framing of the original Case, there are certain points upon which, in all probability, those who instruct me would think it right that I should endeavour, even at the risk of some repetition, to put forward before the Tribunal a summary of the argument which my honourable and learned friend, the Attorney General, has so admirably presented to you.

I propose to rely largely, nay, almost entirely, on the intimate knowledge that this Tribunal must have of the documents and the correspondence which are in the voluminous papers that are before the Court. I propose with very few exceptions, indeed, to rely upon the memory of the Court of documents which have now for many days been under their eye and the contents of which have been discussed before them. I will only say I ought to have—I will not say that I have—at the present time, a pretty intimate knowledge of these documents myself; but if either of my learned friends on the other side who are good enough to listen to me, think that in making any statement with regard to the contention I am urging, I am not wellfounded either in fact or in regard to the contents of any particular document, I hope they will be kind enough to indicate it to me.

Mr. President, I am not unmindful of the extreme attention and the unvarying courtesy that has been displayed by every Member of this Tribunal to those who preceded me, and I know full well that that will be extended to me.

Will you forgive me, Mr. President, as I wish to waste no time at all, if I go at once to the questions in issue with but one preliminary observation—an observation I address not so much to you, Sir, as to those of the Tribunal who have practised in years gone by in the profession in which I have laboured now for a good many years. Those who have been advocates will, I am sure, appreciate that the work I have been doing during the last six weeks has not been perhaps the best fitted to enable one to present what I may call a finished address to the Tribunal. I have been doing, I hope, not altogether without some success, work which I have not been permitted to do for seven years, namely, that of

a junior counsel; but notwithstanding that I have by the accident of my position for the last seven years not been called upon to fulfil those duties, I have endeavoured to fulfil them at any rate to the best of my ability. But I desire the Tribunal to understand—I know the lawyers will—that that kind of work is not the best preparation for an address such as one would wish to deliver. Having made these very brief introductory observations, I will ask you now to permit me to go at once to the particular points upon which I have to address you: and without, so far as I may avoid it, any circumlocution whatever.

I propose this afternoon to address myself to the first four questions of Article VI. I hope that I can in the space of to-days' sitting bring before the notice of the Tribunal all that it is necessary for me to urge with regard to them. It is scarcely necessary, Mr. President, that I should add, that, as my learned friend the Attorney General has done, I decline to argue the question of Regulations at all as a part or a branch of this subject. In my opinion, it would be contrary to the scheme of the Treaty; it would be contrary to the compact made between the parties before they were in Court; and although in the exercise of that discretion and of that courtesy which is recognised among members of our profession, on the wish being expressed by my learned friends on the other side that they should be permitted to mix up their arguments in one and deliver them at the same time, we did not think it necessary further to stand on our strict rights under this Treaty, we think that we should not have been doing our duty if we were, in anything we say on the five questions mentioned in the 6th Article, to trespass or trench upon the subject matter of Regulations.

Now, Mr. President, Senator Morgan will forgive me if I refer to an observation that has fallen from him more than once, and which was alluded to by the Attorney General this morning, expressing a little doubt as to whether the five points mentioned in Article VI are really exhaustive of the questions of right submitted to this Tribunal.

I make an admission at once, perhaps going a little way beyond what the Attorney General has said, namely, that if the United States had desired to raise any additional question of right beyond those five questions, and had put them either in their Case, their Counter Case, or their Argument, we should have been bound to meet them. I shall not suggest that, under the points to which I will call attention directly, it was not open to the United States to have raised before this Tribunal any substantial question of right upon which they desired to invite the decision of the Tribunal; but the point which I desire to bring out prominently in relief, before I call attention to the learned Senator's remark, is this, that at no stage of this case, in the Case, the Counter Case, or the Argument, have the United States justified or attempted to justify their action except upon something which is fairly covered by and within the ambit of those five questions.

Therefore if any point is to be started, if it is to be suggested that the United States have other rights under and by virtue of which they can maintain their position, or can justify their seizures, it would be started after the oral argument on both sides, except the reply, had been completed. I have not the slightest reason to believe that anything of the kind will be done. I believe that perfect candour and fairness have been shown by my learned opponents,—if they permit me to call them my learned friends I shall desire to do so—in connection with this matter; but I cannot help saying that if it were thought that there was some other justification of the action of the United States than that which is indicated in general in Article VI, expanded in particular in the Case Counter Case and Argument, one would have

pected to find some trace of it; and with such industry as I have en able to bestow upon this case I am not aware there is any ground justification put forward which has not been touched upon either by r learned friends Mr. Carter or Mr. Coudert, or indicated in writing my learned friend Mr. Phelps, to all of which as I have already said r learned friend the Attorney General has addressed his argument. Now the learned Senator has more than once directed attention to e difference between the words "question" and "point"; and I will k leave to read once more the opening words of Article I, for I am t sure that he always had them in his mind, when he was making e observations so courteously to us. They are practically for this rpose the same as the preamble, but in order to omit nothing I had tter read the preamble first:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and United States of America, being desirous to provide for an amicable settlement the questions which have arisen between their respective Governments concern- the jurisdictional rights of the United States in the waters of Behring's Sea, d concerning also the preservation of the fur-seal in or habitually resorting to the d sea, and the rights of the citizens and subjects of either country as regards the king of fur-seal in or habitually resorting to the said waters, have resolved to bmit to arbitration the questions involved.

I do not think it can be denied that what is there meant to be referred e the questions which have arisen between the Governments respect- g the jurisdictional rights concerning the preservation of the fur-seal d the rights of the citizens, and if I turn to Article I the words, ough not actually *verbatim*, are for all substantial purposes identical.

The questions which have arisen between the Government of Her Britannic ajesty and the Government of the United States concerning the jurisdictional ghts of the United States in the waters of Behring's Sea, and concerning also the reservation of the fur-seal in or habitually resorting to the said sea and the rights the citizens and subjects of either country as regards the taking of fur seal in or abitually resorting to the said waters shall be submitted to a Tribunal of Arbi- ation.

The whole scheme, the whole statement, the whole sentence, is gov- rned by the opening words "the Questions which have arisen". I m sure the learned Senator will not think that I desire in any way to arrow the rights of the United States. I admit freely that they are ntitled to raise in this Arbitration any justification of their action hich appears either in their Case, Counter Case, or Argument, and irly within the meaning of language there used.

Senator MORGAN.—Sir Richard, will you pardon me for saying that y purpose was to arrive at what the duties of the Arbitrators are ith respect to the rights of either party, not the rights themselves.

Sir RICHARD WEBSTER.—I quite follow; and it was for that reason wished to call your attention to this. I submit that the duty of this ribunal is to determine the questions as to jurisdiction, to determine e questions as to preservation, and to determine the questions as to ght—

Senator MORGAN.—That are submitted.

Sir RICHARD WEBSTER.—That are submitted; and I ask that the ribunal in considering the matter will, at any rate, I am sure in fair- ess to those before them, if any other idea passes through their minds, dicate it to us, because when I come later on to examine the conten- ions of my learned friends, Mr. Carter, Mr. Coudert and Mr. Phelps, ou will find that they are all within the ambit of the five points which re referred to in Article VI.

Now, a few words only with regard to the origin of the points in Article VI. I am not going through the history again, because, some days ago, the Attorney General read the letters to you. They were framed originally, almost in the shape in which they now stand, by the United States. The fifth question was the one that was altered, because in the form originally proposed, it appeared to Lord Salisbury to assume too much right, to give too large a concession to the United States as regards their rights; and, therefore, the fifth question in the shape in which it now appears was framed about the middle of 1891, the earlier form of it having been proposed by Mr. Blaine at the beginning of 1891; it was framed in that shape, so that while it should not limit in any way the rights which the United States might claim, yet still it should not, on the face of it concede to the United States any position which Great Britain was not prepared to give them.

These observations, Mr. President, when the Tribunal comes to frame its decision, will, I submit, be found not to be without their significance; because my learned friend, Mr. Phelps, going, I am sure, as far as he could go and wishing to go as far as possible, indicated to you many days ago that, although he had no authority, to speak for the present Government of the United States as an Executive Officer, and though his position here was that of Counsel merely for the parties who instructed him, said he had no moral doubt in his own mind that the finding of this Tribunal, with regard to the five Questions submitted in Article VI, would be respected by the Government of the United States and be upheld in so far as it was necessary to consider the questions which might ultimately arise under Article VIII.

I think I am correctly representing my learned friend the Attorney General when he said that of course with regard to any claim which Great Britain might make under Article V, the Government would feel bound to admit against Great Britain, if necessary, any finding of this Tribunal which arises in answer to the five points mentioned in Article VI. But what is the significance of this? Surely it is this, that if the United States had any right or any claim of right under which they could justify, or under which they were entitled to justify, their action, they must do it in their Case, Counter Case and Argument. They cannot ask from this Tribunal any finding, or the insertion of any words to indicate that behind the justification put forward in the five points mentioned in Article VI, there is some other justification not to be gathered from the written papers, not to be gathered from the oral argument, but to be held in reserve and to be used if necessary. I therefore ask the Senator, in common with every other member of this Tribunal, who I know will give what weight they think any observation of mine is entitled to—I will ask the Senator to let me assume—I say no more than that, for the purpose of my argument, that the justification for the acts of the United States is to be found in the five points enumerated in Article VI, and provided we are able to show to the satisfaction of this Tribunal that no one of those five points construed in its largest sense, giving to the language embraced in the points the full meaning such as is sought to be given to that language in the written and oral argument of my learned friends,—if we show that the claims which have been made to justify the action of the United States fail either on the ground of law, or because there are not facts to support the particular question or particular point urged on behalf of the United States, we are entitled to have that stated, as was indicated to you this morning, and entitled to have that found by the very terms of this Treaty; for you are directed to place in your

ward a distinct decision on each of the five points, and you are further ld by the language of Article VIII that you are to find upon any uestion of fact involved in the claim, though, of course, you are not award judgment for a specific amount, nor are you to direct the nited States Government, or the British Government, as the case ay be, to make any particular payment.

Now, what, is the meaning of these five Questions? I need only in o sentences repeat what my learned friend, the Attorney General, it before you many days ago. We understand the first four Questions be pointing to the original title of Russia and the derivative title of e United States as the successors of Russia.

Perhaps there is one view of the fifth Question which I do not think y learned friend, the Attorney General, meant to exclude, but in spect of which I should be perhaps prepared to go a little further an his enunciation, as it appeared to me at any rate, to go.

The learned Attorney General was asked by you Mr. President hether, if we construed the fifth question in the way in which he was viting you to construe it, it would not amount to a repetition of the rst four Questions. Now, it seems to me to be quite clear, and only ir to the United States to say and I do not understand that my arned friend, the Attorney General, to say anything the contrary of his, that there is a view of the 5th Question upon which the United tates are entitled to rely which is different altogether from the first our Questions. The first four Questions are conversant with rights sserted and exercised by Russia, with recognition by Great Britain of hose rights, with the question of whether there was not, in the Treaty f 1825, a particular bargain between Russia and Great Britain about hose rights, and whether or not the United States did not get unimaired everything that Russia had. But there is this view of the 5th uestion to which I am later on going respectfully to address the attenion of the Tribunal. It may be that Russia never asserted or exerised her rights, and yet had them all the time. That question was ndoubtedly intended to be submitted to this Tribunal by the fifth uestion. It may be that the occasion for the assertion had not come,—hat the occasion for the exercise had not come. The fifth Question as meant, in my submission, to ask the Tribunal whether or not the nited States does, in fact, possess either by virtue of the United tates own position as a Nation, by virtue of the possession of the slands, and, indirectly if you like, by virtue of her being the successor f Russia as well—does or does not the United States possess any xclusive right of protection or property in the fur-seals referred to in hat Question?

There is one view—I only give it as an instance in which that question might become most material. You are well aware that there has een a discussion, many years ago—rather a burning discussion—as to hether or not the nation owning a particular territory had the exclusive right of fishing in the ordinary territorial waters. At one time here was some question about it. It is quite immaterial for my purose to consider what are the rights or wrongs of that matter. It does ot ultimately become material to this question. But assuming that he United States could have supported their contention originally ut forward that either the whole of Behring Sea, or belts of 100 miles om the coasts of Behring Sea, were to be regarded as being in the osition of territorial waters, it then would have followed that they ight have exclusive rights in the fishery of seals in those waters, as istinguished from the fishery of seals in the high seas. Without in

any way going back upon that part of the case which to me, at any rate to-day, has no more than historic interest, namely as to what the particular contention was that was put forward from time to time by the United States, on looking at the question broadly as to what rights the United States had at the time of the signing of the Treaty—if the United States could have made out that either by the acquiescence of Great Britain, or from the general position of the sea and the Islands or upon any other ground known to international law, they were entitled to the exclusive use of a strip of the sea outside the three-mile limit, then the questions of exclusive right of protection and property would have arisen just in the same way as they have from time to time arisen with regard to bays, with regard to enclosed waters and with regard to the strip next to the coast, be it three miles or more, as from time to time Nations have varied in the width to which they would claim exclusive jurisdiction. I therefore, point out for the purpose of my argument that when I deal with the rights of the United States as distinguished from the rights asserted and exercised by Russia, I shall propose to give the largest meaning to the five questions, in order that if the United States have any exclusive right either of protection or property in those fur-seals, they may have the benefit of raising that question before this Tribunal and of having an adjudication upon it.

Now I will take you for a very few moments back to the early history of this matter, and it is essential, at any rate in order to make my point clear, that I should ask you to go with me a little back in order of time. My learned friend Mr. Carter, in his most interesting argument before you, told you more than once that for the purpose of the negotiations which were going on from 1821 to 1825, or rather, in order to be more accurate, from 1821 to 1824 between Russia and the United States, and from 1821 to 1825 between Great Britain and the United States, the North-West Coast was to be regarded as the strip of land shown on the map in pink colour and accurately represented in language by my learned friend the Attorney General as the *lisière*. Mr. Carter, I think, without proving the statements, told you that whatever may have been the claims of Russia originally under the Ukase, whatever may have been the assertions in 1789, or 1821, that for the purpose of the bargain between the parties the north-west coast meant that and nothing more than that.

Mr. CARTER.—Not quite that. I did not confine it to the *lisière*.

Sir RICHARD WEBSTER.—If my learned friend will pardon me, I think if he looks at latitude 60°, which was the point he took, this is how I understood it, but I am sure I take the correction—he said the North-West Coast went from 60° to 54°-40.

Mr. CARTER.—No, further down.

Sir RICHARD WEBSTER.—I see my learned friend's point now.

Mr. CARTER.—The southern boundary is infinite.

Sir RICHARD WEBSTER.—That points my observation, and, if possible, makes my point stronger when I come to develop it, that the North-West Coast extended northward of 60°, and the southern boundary may have been at 55° or elsewhere. I am obliged to my learned friend for the interruption. I did not mean to misrepresent him; but my mind was concentrated on what was the northern termination of the North-West Coast. I shall point out presently, and I hope this will not be lost sight of in my argument by the Tribunal, that as between the United States and Russia there never was any dispute about the northern boundary of Russia at all; further, that as between Great Britain and Russia there never was any dispute at all about the northern

Russia; the sole question was at what point the *lisière* away, so to speak, and give Russia the whole of the con- North-West. When I presently show its application you is of extreme importance, and, I may venture to repeat en the United States and Russia there was a discussion oundary should be 51°. I only put this figure hypothetic- es no difference whether it is at 51°.50, or 54°.40, or at one United States said, as high as 57° or 58°. It makes no my purpose. From beginning to end of the whole con- ng the years 1821 to 1825, no question ever arose between tates and Russia as to whether the northern boundary at 60° or at Behring Straits, or at Nushagak, or at any a fact the discussion which has attempted to be imported :oversy by my learned friend Mr. Carter, who has gone, if e me saying, the extraordinary length of saying that the s and Russia agreed that the North-West Coast, for the e Treaty, meant that little bit, the *lisière*—that after the it was fixed when in the Treaty of 1824 they talk of the Coast, they meant the *lisière*—he has gone the length of lthough Great Britain had no knowledge of it, yet Great ited as a sort of heir-loom, a *damnosa hæreditas*, if I may ession, a construction of the clause which upon its face l not bear, from the United States, because the language ir article was originally taken from the American Treaty. elp reminding you, Sir, that when pressed by a question unal, "should you, Mr. Carter, say that if in the corre- tween Great Britain and Russia it was clear that the words l in another sense?" Mr. Carter, with a frankness I should d, and which we all should have expected from him, said , I should not". Then, said the Member of the Tribunal, is, what was the meaning which had been put upon those correspondence between, not the United States and Russia, for this purpose would not make any difference, but it Britain and Russia. Upon that we did not hear one f argument from Mr. Carter or from Mr. Coudert in follow-

e take you to the earliest period of time, so far as it is it the fact that when the parties began to assert their ights respectively, they were between themselves, so to ferring to the North-West Coast, meaning thereby nothing . I will not involve the question again by trying to fix a ndary; that is immaterial for my purpose, were they coast which was to have nothing on it north of 60° or of ch was not to go north of the Aleutian Islands. I have ut upon a map,—I will hand you a copy and lend one to iends, and perhaps they will be good enough to lend it to erwards—it is my own work and therefore I will take the for any faults that there are—I have put what was the gs so far as the case shows prior to the year 1821. The is taken from the British Case, and it shows, I think at a the statement made that all that the people knew about it in connection with the North-West Coast was south of s not accurate.

bserve what has been done. I will not take it in order of d occupy a little time, but I will take it in the order that on is given on the map. If you start at Sitka, I have

drawn a red line, and I have put the names of the vessels, the "Caroline" and "Eliza;" and the place where that is to be found in the British Case is page 20. The year is 1799. The nationality, so far as it could be ascertained, which is indicated by an initial, in that case happens to be American. That was a case in the year 1799, when the "Eliza" visited Sitka. The next in 1802 was a vessel called the "Jenny"; and then if you will look at Behring Bay, you will find the "Jackal", a British ship, 1792 to 1794. Then opposite Mount St. Elias, which was mentioned in reference to it, you will find La Pérouse went in a French vessel in 1786, mentioned in the British Case at page 17.

Now I desire to call attention to two localities well-known now, Cooks Inlet and Prince William's Sound; and I call attention particularly to this, Prince William's Sound is about 200 miles to the westward of the line of boundary, or latitude 60°; and Cooks' Inlet is considerably further.

Then, Mr. President, if you will observe with reference to Prince William's Sound, there are several cases of vessels going there. The "Phoenix", which was a British ship; the "Fidalgo", a Spanish vessel, both in 1790. Portlock and Dixon were there in 1786 to 1789; and Vancouver in 1794. Then, if you go to Cook's Inlet, Douglas was there in the year 1791, the name of his vessel was, I think, the "Iphigenia"; and Portlock and Dixon also and Vancouver. Then, the Spaniards visited Kadiak, in 1788; and in 1800 the "Enterprise" and in 1808 the "Mercury", both being British ships. Then, if you will run your eye along to Unalaska, you will find that was visited by the Spaniards in 1788; and by a man whose voyages are well known, Meares; and the Island of Atka was visited—also by Meares in the years 1785 and 1786.

Then, on the coast of Kamschatka, you will find two voyages to a place now known as Petropaulovsk—in 1792, the "Halcyon" and the "Flavia" and, as you will be good enough to run your eye to the extreme North, where you will find a mark put of Pigott's voyages (to which I shall make reference later) as far as Kotzebue Sound; and I shall show you, by the correspondence, he had been trading all along the coast of Kamschatka as well as visiting parts of the coast of America in Behring Sea.

Now I may be permitted to remind you that the whalers of 1842 were in Behring Sea. I have merely indicated it and given the reference to it. It is in the British Case, page 83, so that even from what we are able to trace in respect of a district comparatively speaking. of course, little opened up, there had been substantial trading, and this will be found to have been the main ground of the attempted action by Russia—there had been substantial trade to various places well to the north, using the expression of my learned friend, Mr. Carter, of latitude 60°.

Therefore, upon the face of this information, you would not expect to find the North-West Coast was to have the limited meaning which my learned friend, Mr. Carter, wishes to give to it.

Mr. Justice HARLAN.—Is this a copy of a map of any particular date as to the names and spelling, and so on?

Sir RICHARD WEBSTER.—It is the Map N° 1 of the United States Case—Behring Sea, North Pacific. I do not think they give the date. I merely used it because it happened to be the most convenient to put the names on. It has no value beyond being distinctly authentic as coming from the United States—but upon that I wrote down those names, taking them myself from the Case—the dates, boats, and the voyages; and I desire, before I break off to point out that while I am going to show you that complaints of trade along these coasts led to the action of Russia, it is idle to suppose that we know anything like

he whole of the vessels trading along the coast. There was no rea-
on as is observed in the British Commissioners' report and in the
'ase for the vessels registering their names—there was no reason for
heir names being known. I do not suppose that ports of registry
xisted on this coast, at any rate there was very little indeed to lead
ıese vessels to record the places that they called at when trading with
ıe nation, but even with the limited means of information that we have
e are able to show that when Russia began to make her complaint the
ɔsition was that there had been substantial navigation, substantial
ading and substantial interference with the rights which she very
ɔperly desired to protect far away to the north of the point which
ɔording to my learned friend Mr. Carter's argument was the only
ɔint the parties cared about.

Mr. Justice HARLAN.—Did the contest between Great Britain and
ussia at that time embrace any settlement on either side of what is
ɔw called Behring Sea.

Sir RICHARD WEBSTER.—I do not think so.

Lord HANNEN.—As a matter of fact Captain Cook took possession
' certain portions in the Behring Sea.

Sir RICHARD WEBSTER.—I should have said with reference to Mr.
ıstice Harlan's point I think it is obvious that at that time the parties
ere not relying strictly and solely upon their right of first possession
ɔcause Great Britain had, if it had been a contest as to territory, prob-
ɔly an earlier claim to parts in Behring Sea than Russia, but that
ɪings out the point to which the Attorney General called the attention
' the Tribunal many days ago, that Great Britain cared very little
ɔout the coast—in fact it was comparatively immaterial provided the
ght of free navigation and free fishing was not interfered with and
as enjoyed by her subjects after the year 1821 as they had been before.

Mr. Justice HARLAN.—Your argument is that the North-West coast
xtended all around there to these different points visited by the British
essels.

Sir RICHARD WEBSTER.—I say the North-West Coast extended right
p to Behring Straits. I say that of this contention of Mr. Carter's, for
ıe purpose of the Treaty in 1825, that that is the North-West Coast,
ıere is not a trace to be found in any original document or contention.
his is not to depend on the assertion of counsel. If the document
ists showing the word North West Coast at that time was understood
mean that, that document would have been produced; and, of course,
ıen it is produced I will deal with it. I am prepared to refer if neces-
ry to any documents to which my learned friend can call attention.
I shall refer pointedly to one, which is the Baron de Tuyll's commu-
ɔation, which shows that the Company tried to get a limit put, not on
ɔ words North West Coast, but on the right to visit during 10 years.
ıssert, and I beg the Tribunal to take it as my recollection of the
ıding, that from beginning to end of this correspondence there is not
ocument indicating that North West Coast was understood by Russia,
ɔ United States, or Great Britain, as stopping at any point whatever
rth of 54° 40′. It went from whatever the southern boundary was—
ɔ at one time in the days of 1799—right away up through Behring
a; and it is the simple fact, and you will find it of great importance,
ıt between the United States and Russia there was no contention
ıatever as to the northern boundary of Russia. The whole point was,
w far south can we stop Russia coming to? And as between Great
itain and Russia you will find,—except to ascertain the point of
parture where that line running north was to go up so that Russia

had everything to the west of it—there was absolutely no contention between Great Britain and Russia as to the point on the coast to which the Russian possessions went.

The PRESIDENT.—If you say that the contention merely bore on those parts of territory and seaboard, how can you imply that Behring Sea was contained and comprised in those definitions?

Sir RICHARD WEBSTER.—I am afraid I have not made my meaning clear. I say the contention bore from whatever point in the South you liked to fix right to the extreme North.

The PRESIDENT.—There was nothing in question as to Behring Sea coast?

Sir RICHARD WEBSTER.—Nothing, except the right of navigation and fishing. I must have expressed myself very badly if I had not conveyed that.

The PRESIDENT.—As regards the coast, there was no contention except as to what?

Sir RICHARD WEBSTER.—As regards navigation and fishing, and the right to visit uninhabited points in accordance with international law. The whole area, up to the North, was in question.

Mr. Justice HARLAN.—There were no conflicting settlements?

Sir RICHARD WEBSTER.—There were no conflicting settlements on the coast between Great Britain and Russia. There was no question of a claim to territory by Great Britain on the coast of Behring Sea.

If you would look at page 38 of the British Case, you will find Russia's description of the North-West Coast at the time of the Ukase, the attempt to exclude other nations from exercising then right:

Section 1. The pursuits of commerce, whaling, and fishery, and of all other industry, on all islands, ports, and gulfs, including the whole of the Northwest coast of America, beginning from Behring Straits to the 51st of Northern latitude.

Therefore, I do not start with that, because it does not happen to be quite the earliest document; but there is a document, which I am going to make allusion to where our construction of "North-West Coast" is put by Russia, and there is not a single document in which a trace can be found of a different definition of "North-West Coast", not a single document; yet my learned friend, Mr. Carter, says that "North-West Coast" is to be regarded as beginning at 60°, if I may use the expression, and coming downwards, after the Treaty he says, ending at 54° 40′. My whole point is, there was no discussion as to the point on which Russian possessions ended on the coast itself away to the North.

The Tribunal then adjourned for a short time.

Sir RICHARD WEBSTER.—Mr. President, I find that by inadvertence I made a mistake in regard to that map. I had originally put the red marks on the "number one" map in the United States Case. When I directed a copy to be made for Mr. Phelps and the court there were no copies of "number one" to be had, and therefore those red marks had to be put upon a map of ours. Mine is on the original; but there is no difference. There is nothing upon the map except agreed matter. I only desire to correct a mistake I made by inadvertence, not remembering that they had not been plotted on the same map as the one of the United States.

The PRESIDENT.—I believe it is on your map which is in the Appendix?

Sir RICHARD WEBSTER.—I am not sure if it is even that. Yes, you are right, Mr. President. It is the one which is in the 4th volume of the Appendix to the British Case. There are only two maps which were exhibited.

am with the permission of the Tribunal, directing their attention to period before 1821. I am not upon the period of 1821 at all. Two ters were prominently brought forward in the United States case ing this period as bearing upon the assertion and exercise by Russia ertain rights; and I call the attention of the Tribunal to page 42 of United States Case. You will see in a moment, Mr. President, when ad this language, the importance that they attach to the exercise Russia as distinguished from the assertion; and on page 42 of their e, which still stands not withdrawn, there occur these words. I ve that the Tribunal have seen the copy that Mr. Foster was good igh to agree upon with me, showing what was cut out from the United es Case, and therefore I need not at any time refer to anything that been cut out. But this paragraph still stands:

e official Russian records show that after the ukase or charter of 1799, granting e Russian American Company certain exclusive control of trade and coloniza- its authorities, acting under the sanction of the Russian Government, did not it foreign vessels to visit Behring Sea.

ow you will observe the importance of it, Mr. President in a moment. y were desirous of proving that Russia had exercised more or less idiction in Behring Sea. What the character of the jurisdiction asserted was I shall discuss later on. I speak subject to correction n my friend Mr. Phelps comes to reply, or at any time, if he wishes orrect me; but I am not now aware of any document, official or rwise, that supports the allegation to the slightest degree that the sian Company or Russia did not permit foreign vessels to visit ring Sea after 1799. On the contrary as I shall show you in a very moments on the face of the original documents it is quite clear that ign ships were visiting and were trading in Behring Sea between and 1821; but that I may keep strictly to the order of the dates, ist again remind the Tribunal... for it seems to have been forgotten ny learned friends... how it was that the Ukase of 1799 came to be e. It is stated at page 15 of the Counter Case of the United States the Ukase of 1799 was directed against foreigners. I ask the ntion of the Court to this matter; because this is after the with- val of the documents which the United States most properly and kly withdrew. They repeat their statement that the Ukase of 1799 directed against foreigners. That is to be found on page 15 of the ted States Counter Case. Upon this point a quotation is given from ter from the Russian American Company to the Russian Minister inance, under date of June 12th, 1824. I ask the attention of the unal to that date, not 1799 or about that date, but June 12, 1824. quotation is a follows:

e exclusive right granted to the Company in the year 1799 imposed the prohibi- to trade in those regions not only upon foreigners but also upon Russian sub- not belonging to the Company. This prohibition was again affirmed and more ly defined in the new privileges granted in the year 1821 and in the regulations rning the limits of navigation.

erefore you will observe, Sir, that both in their Case they assert official documents will show, and in their Counter Case they allege, n referring not to a contemporaneous document but to one of 1824, the Ukase of 1799 was an executive act intended to operate against gners.

hat are the facts? I wish to take this as briefly as possible, because call the attention of the Tribunal to it they will be good enough, I e no doubt, to note it as being of importance. At page 22 of the ish Case will be found the history of the Ukase of 1799. I will

quote nothing which depends upon what I may call doubtful British testimony. What I am about to quote comes from Russian sources, in so far as Bancroft, among others may be said to be a Russian source. I will call your attention, Mr. President, to page 23, speaking of the period just before 1799:

Thus, on every side, rival establishments and traders were draining the country of the valuable staple upon which rested the very existence of the scheme of colonization. To the east and north there were Russians, but to the south-east the ships of Englishmen, Americans, and Frenchmen were already traversing the tortuous channels of the Alexander Archipelago, reaping rich harvests of sea-otter skins, in the very region where Baranoff had decided to extend Russian dominion in connection with Company sway.

Lord HANNEN.—What is the Alexander Archipelago?

Sir RICHARD WEBSTER.—The Alexander Archipelago is that which is in the right of the Alaska Coast, practically down the *lisière*. It is that cluster of islands. It is on that part of the coast which Mr. Carter calls the North-West Coast.

Lord HANNEN.—That was the name of it?

Sir RICHARD WEBSTER.—I think it was only the temporary name. I am not sure that it has been continued since.

Now, Mr. President, you will find—and the Tribunal will forgive me if I attempt to pass this somewhat shortly—that there was a Russian committee directed to sit upon this matter; that they reported, as stated on page 24, with reference to the petition of the right to monopolize; and that the Ukase of 1799 was in consequence of a Russian representation that the Company as it was then constituted could not compete successfully with other trade competitors; and I want to know what answer, Mr. President, is to be given to the United States view of this in the state papers in the year 1824, an extract from which is set out on page 28. To-day the United States people say the Ukase of 1799 was intended to operate against foreigners. What did they say in the year 1824? I call the attention of the Tribunal to page 28:

The confusion prevailing in Europe in 1799 permitted Russia (who alone seems to have kept her attention fixed upon this interest during that period) to take a decided step towards the monopoly of this trade, by the Ukase of that date, which trespassed upon the acknowledged rights of Spain; but at that moment the Emperor Paul had declared war against that country as being an ally of France. This Ukase, which is, in its *form*, an act purely domestic, was never notified to any foreign State with injunction to respect its provisions. Accordingly, it appears to have been passed over unobserved by foreign Powers, and it remained without execution in so far as it militated against their rights.

I appeal from the United States of 1892 to the United States of 1824; I appeal from the period of comparative ignorance to the time when knowledge must have been fresh, information easily to be acquired, and facts easy to be ascertained. And the official Minister of the United States in 1824 states that the operation of the Ukase of 1799 was purely domestic. The counsel for the United States to-day, being desirous of proving an assertion and exercise by Russia, state formally in their case that after the Ukase of 1799 foreign ships were not allowed to enter Behring Sea, and they further state that it was intended to operate against foreigners. Is it not saying too much; and I respectfully challenge my friend Mr. Phelps when he comes to reply—my assertion is worth nothing unless I support it by reference to documents—to point to any act done by Russia; to point to any exclusion of foreign ships at any time—anything, which is in support of this allegation.

Mr. Justice HARLAN.—Sir Richard, can you refer me to that docu-ent of June 12, 1824, referred to in the Counter Case of the United ates, page 15, the one you read a while ago? I do not know where is in the record.

Sir RICHARD WEBSTER.—I will in a moment, Judge. It is not inted; but that extract is correct.

Mr. Justice HARLAN.—It is correct?

Sir RICHARD WEBSTER.—Oh, yes; that extract is correct. We have ly got the Russian document, not the other parts; but it is a perfectly rrect extract; and I call your attention, as you have been good ough to allow me to do so, to the date as being in 1824, when, as you now, Sir, the company were doing the utmost they could to support e Ukase of 1821. Therefore I am justified in saying—and I am sure ou will follow me—that in no sense, from the point of view I am llowing, was it a contemporaneous document.

But it is curious, Sir, that the official document of the 7th of April 821, coming from the United States Minister at St. Petersburg contra-icts that, if any reliance can be placed upon it, for in 1824 the official linister of the United States, writing to Mr. Adams, makes that state-ent with the authority of his position at a time when unquestionably he company were using all the powers they had to get an extension of heir privileges.

But, Mr. President, this matter is really put beyond all question by he Riccord-Pigott correspondence; and this incident in the case is a ery curious one. I trust my learned friends will not misunderstand e. I am satisfied that everything that has been put forward on behalf f the United States both by their agent and their counsel has been ut forward in the fullest good faith; but I shall have to call attention the fact that when it is necessary to remove the impression of an rgument which is founded on original and official documents, they are ggested for the first time in this case, after the lapse of years and ears, to be either incorrect in their phraseology or to have a different eaning to that which the words themselves would indicate. That ccurs more than once in the course of this case.

Now, sir, in the original case now withdrawn, the Riccord-Piggott orrespondence was put forward as an instance of Russia preventing reign trade. It is sufficient for my purpose to call your attention, ir, simply to the fact—I read nothing from it—that on page 45 of the nited States Case, the Riccord-Pigott incident appeared as under the ate, quite correctly, of 1819. It ran through four pages, from 45 to 49; nd it was used, perfectly legitimately—as the documents were then upposed to exist:—in order to support the case, which they then elieved to be the truth, that Russia had prevented vessels from going nto Behring Sea. Will you be good enough, Mr. President, to kindly et your eye run on to page 49—all is now struck out from page 45 to age 49—but at page 49 you will observe that the thread of the story is hen taken up:

> It thus appears from the foregoing citations that, so far as it concerns the coasts nd waters of Bering Sea, the ukase of 1821 was merely declaratory of proexisting laims of exclusive jurisdiction as to trade, which had been enforced therein for any years.

That is not withdrawn. That is a statement made on evidence which hey then believed to be true, that for many years the trade of foreigners ad been prohibited in Behring Sea.

> The Ukase of 1799 which set forth a claim of exclusive Russian jurisdiction as far outh as latitude 55°, called forth no protest from any foreign powers, nor was objec-ion offered to the exclusion of foreign ships from trade with the natives and hunt-

ing fur-bearing animals in the waters of Behring Sea and on the Aleutian Islands as a result of that ukase and of the grant of exclusive privileges to the Russian American Company. It was only when the ukase of 1821 sought to extend the Russian claim to the American continent south to latitude 51°, and to place the coasts and waters of the ocean in that region under the exclusive control of the Russian American Company, that vigorous protests were made by the Governments of the United States and Great Britain.

Therefore, Sir, there stands to-day that statement, without—I say it with great respect—a shadow of evidence to support it, that prior to 1824 the Ukase of 1799 had been used to exclude foreigners, and that in fact the only complaint was the extention of the Ukase of 1821.

Now, Sir, I have said that the Riccord-Pigott incident, struck out—honestly and fairly struck out—from their case when they found that they had relied upon falsified documents, when you look at the true documents, is an absolute contradiction of their statement as to the exclusion of foreign vessels from Behring Sea. I will take this as briefly as I can, but it is of some importance. May I ask you to be good enough to turn to page 18 of the British Counter Case. The original documents are set out in the revised translation supplied us by the United States at pages 13 to 17 of Volume one; but you need not refer to that. You will find all that is material at pages 18 and 19 of the Counter Case. Now, Sir, what are the facts?

Riccord and Pigott had made a contract with the Russian American Company to go whaling; the monopoly having been guaranteed to Russian subjects: the Government objected—not at all improperly—to an Englishman having any interest in it; and accordingly you will find at page 18 the extracts from the letters referred to, from which it appears that Riccord, the Superintendent of Kamtchatka, had made an agreement with Pigott, an Englishman, for ten years, from 1819,

with reference to fishing for whales and extracting oil from these and other marine animals on the shores of Kamchatka and on those of all Eastern Siberia, in the harbours and bays and amongst the islands.

I need not remind you, Mr. President, that Eastern Siberia is washed by Behring Sea. It is not a question of the Pacific Ocean only. It is a question of the waters right up into Behring Sea.

Justice HARLAN.—That Pigott is marked on your map?

Sir RICHARD WEBSTER.—That is marked on the map at Kotzebue Sound. That is on the other side. I was at present taking it up in the order of time. At present we have got him only as far as Kamchatka.

Lord HANNEN.—You did not read all of that. It reads "On the shores of Kamchatka".

Sir RICHARD WEBSTER.—Perhaps I did not express myself plainly. I am now merely dealing with the Western side, Kamchatka and Eastern Siberia, not with the United States side.

Now, what is the objection which the Governor takes? I will tell you, Mr. President, if you will look at the original correspondence. It turns out that the company were unwilling to enter into the whaling trade. It did not pay or they supposed it would not pay. Whereupon they were directed to turn their attention to the whale fishery; and the Government further ordered that no foreigner should be allowed to enter a merchant guild, or to settle at Kamtchatka or Okhotsk, and that no foreign merchant-vessel should be permitted,

to trade at those places under any circumstances, or to enter the ports of Eastern Siberia except in case of distress... Furthermore, the Englishman Davis at Okhotsk, and Dobello's agent in Kamtchatka are to be informed... that the Government refuses them permission to remain at those places, or to build houses or hold real property there; the local authorities shall afford them all proper facilities for disposal of their property and leaving the country.

Sir, as time is of great importance, I will merely mention—it is not ecessary to read it—the rest of the document at page 14. I am quoting om the United States translation at page 14 of Appendix I. It will ppear that in the end the only prohibition was against holding land or ntering the trade guilds; and more than that, that they might be in Behng Sea is obvious because they could not very well enter the ports of stern Siberia except in case of distress, unless they were up there mewhere in the sea. I need not pause to argue that, because the cts are conclusive. If you, Mr. President, and the other members of e Court, will kindly look at page 19 of this correspondence produced us upon notice to Mr. Foster, you will find a letter that shows that igott was trading on the coast of Behring Sea, and had gone up as r as Kotzebue Sound, the place I quoted when Mr. Justice Harlan was ood enough to put the question to me, and a letter of January 21, 21, puts it beyond all doubt what the fact was:

On the 29th September, 1820, the American brig "Pedlar" arrived at this port. r captain is Meek, a brother of Meek who is well known to you. She had on ard Mr. Pigott, with whom you are well acquainted. He was the supercargo or ner; for the cargo was under his control, and he directed the movements of the ip. He had come from Kamtchatka in eighteen days.

There were at that time two men-of-war on the roadstead, and this fact afforded frequent opportunities of meeting Pigott, for he was acquainted with the officers both of them. *They had met beyond Behring Straits in Kotzebue Sound*, and had en anchored there together. He said, in a hesitating way, that *he had been trading re.*

I must confess that *I was wrong when I said*, in a letter to Michael Michaïlovitch *t a single man-of-war would be sufficient to put an end to this traffic.*

It is not necessary, of course, to point out that if this were not someing serious, it would not have been spoken of in this way.

To tell the truth, I did not believe it at the time; but I was afraid that a whole uadron, or at least a couple of frigates, would come down upon us. This prospect ghtened me, both as Manager of the American Colonies and as a Russian. They uld have eaten up all our provisions, and cost the Emperor a lot of money, without ing much good.

What hope is there that a single frigate will be able to stop this traffic on our ores, abounding in straits and excellent harbours, *and so well known to these Amerns that they may be called the pilots of these coasts?* They will always be on good ms with the natives. . .

Is it not a little strong, Mr. President, for my learned friends, in the e of the facts that their own documents disclose, to adhere, as I derstand them to adhere, in their Counter Case, to the view that or to 1821 there had been a prevention of trade and an exclusion of eigners from taking part in the trade within the prohibited region?

Lord HANNEN.—Was there not, Sir Richard—I am not dealing with effect—a prohibition of trade with the natives on the shores by the ssians?

Sir RICHARD WEBSTER.—At what date, my Lord?

Lord HANNEN.—Well, from the date of 1799.

Sir RICHARD WEBSTER.—I think there was. The important point that it was in order to prevent, if they could, access to the shores, d that it is wholly untrue to suggest, as the original Case did, that object of the Ukase of 1799 was to prevent the vessels from navigting the waters of Behring Sea or from exercising rights upon the gh sea. I think what my Lord Hannen was good enough to refer to section 10, (on page 13 of the British Counter Case), of the Ukase 1799:

10. In granting to the Company for a period of twenty years, throughout the entire tent of the lands and islands described above, the exclusive right to all acquisitions, lustries, trade, establishments, and discoveries of new countries, etc.

I am not sure, my Lord, that in terms the Ukase of 1799 prohibited foreign trade; but it is not material for my purpose. I would assume that the general effect of it may have been to give foreign trade, as far as Russia could, to the particular company. But the point that I desire to bring out is that there is absolutely no evidence of any exercise of the right of exclusion by Russia. On the contrary, when you come to look at the documents, it is clear that there had been extensive interference with their foreign trade, which the company objected to.

Mr. Justice HARLAN.—Whatever rights were given by that Ukase were given exclusively to this company?

Sir RICHARD WEBSTER.—Certainly.

Mr. Justice HARLAN.—Whether they extended to the whole ocean or only to the coasts or islands?

Sir RICHARD WEBSTER.—So far as Russia was concerned, whatever she gave, she gave it exclusively to the company. It is quite clear that the United States view in 1821 was that it had no operation against foreigners, and I submit it would have no operation against foreigners. Its object was to consolidate the many rival companies. That is stated also in Bancroft's book, quoted in the British Case, but I do not go back upon that.

Now, Mr. President, if you will turn over to page 20 of our Counter Case, you will find there the letter from the Governor-General of Siberia:

We are familiar with the complaints made by the American Company in regard to the bartering carried on by citizens of the United States at their establishments, and in regard to their supplying the natives with fire-arms. *These complaints are well founded, but nothing can be done in the matter.* It would be useless to apply to the United States Government to stop the trading: the commercial rules of the United States do not allow such interference on the part of their Government. *The only thing to be done is* for the Company to endeavour to strengthen the defences of the principal places in the Colonies, and for the Government, at least, *not to favour this foreign trade.* But the establishment of a whale fishery on the eastern shores of Siberia would undoubtedly favour it in a high degree. The establishment of a whale fishery would be a pretext for, and an encouragement to, foreign trade.

Later down in the same letter:

Mr. Riccord—

He was the Superintendent of Kamschatka—

says, in his letter, *that, owing to the smallness of our forces* in that part of the world, *we cannot prevent foreigners from whaling.* In the first place, we may not be so weak as he supposes. The occasional appearance of a single properly armed ship may be sufficient to keep quiet and disperse all these whalers.

Then on the 28th of February, 1822, you will find that the object which was recognized there was to get a footing for this purpose—for the purpose of collecting furs on the Aleutian Islands,

or on the northern islands situated in the direction of Behring Strait, that he made his proposal, of which you have already been informed, with regard to whaling and fishing for the benefit of Kamtchatka and Okhotsk.

In the face of that, Mr. President, it is not too much to say, I submit that regarded from the point of view of information and facts gathered from every source, there is not the slightest shred of evidence beyond the withdrawn documents, now admitted to be untrustworthy and not to be relied upon, of any exercise by Russia at all prior to 1821.

Now I come to 1821; and I must be permitted to make a few observations with regard to the Ukase of 1821. I read to you, Mr. President, before we adjourned, at the suggestion of my learned friend, Sir Charles Russell, from page 38, I think, if I remember right, of the British Case

anguage of the Ukase; and I need not read it again. I may have fer to it perhaps in another connection. Now I ask the kind atten- of the Tribunal to a point made by my learned friend Mr. Carter, h, if I may be permitted to say so as an advocate, certainly was what surprising. He said Russia never attempted to claim any isive jurisdiction in any part of Behring Sea: that it was not a to exclusive jurisdiction; and Mr. Carter supported his statement inted passages in the Argument. I can give the references in case be required.

ys Mr. Carter, it was not a claim to exclusive jurisdiction; and again I speak with care. For the first time, for the purposes of argument, it is suggested that the claim to exclude the ships of ations 100 miles from the coast is not a claim to exclusive jurisdic- and exclusive dominion. I confess, so far as advocates are allowed ave feelings, that a feeling of surprise did come across me. It rred to me that this proposition required some authority: that ding vessels from 100 miles from the coast was not an assertion of isive dominion and an exercise of exclusive jurisdiction.

lesire to say here with reference to an observation made by Mr. ice Harlan more than once to my learned friend, the Attorney- ral, that I do not think that Russia had any intention of closing ing Sea. I do not think that Russia at that time knew anything t, the actual width of the passes. I do not suppose the passes been surveyed. They may have had sufficient knowledge to know they might have closed it, or they might have not. That they ied that this part of the world had all the characteristics which d have justified them in closing the whole area, there is no doubt; I am disposed to adopt, if I may say so, the view put forward by Justice Harlan, that whatever they meant by their hundred miles, did not have it in their mind that thereby no ship would be able into the middle of Behring Sea; but if once that be recognized, engthens my position enormously. For on what authority of text- judicial writer, or judgment, can my friend suggest that exclud- ships, excluding navigation, from a given belt from your coasts is naking them, even something more than territorial waters, for it is xercise of dominion. Why, Sir, may I remind this Court, every ber of which, I know, is acquainted with the fact, that it has been ject of discussion whether even within the three-mile limit there t a right of navigation for peaceful purposes. I know Mr. Juctice an was good enough to read through, or look through, the judg- s in Queen v. Keyn. There is a very considerable discussion in y of the judgments in Queen *v.* Keyn as to whether in territorial rs, that is to say in waters in which, for certain purposes, undoubt- the country had exclusive jurisdiction and exclusive dominion, her the right of peaceful passage was not still an international . I believe I am not going too far in saying that all the Judges that view; and yet in the face of that discussion, counsel are found y that the claim to exclude ships from 100 miles of the coast is not ttempt to exercise over those 100 miles sovereign jurisdiction.

ave looked at several books, and I might really occupy as many s as I wish to occupy minutes, in citing authorities to show that rigin of all this idea of exclusion was an extension of dominion territorial waters, land-locked seas, and a variety of arguments have been brought forward to give exclusive dominion; but I will ent myself with reading from Chancellor Kent. I ask the Tribunal sten to what Chancellor Kent said of this claim of Russia, which is

sufficient for my purpose. Mr. President, you know Chancellor Kent by name, the great American jurist. This is in the original edition. When I say the original edition, I am not certain it is in the first, but it is one of the editions which were edited by the great lawyer himself; and I read from the 9th edition, published in 1858, from the original page 31, the original text, volume I:

The claim of Russia to sovereignty over the Pacific Ocean, north of the 51st degree of latitude as a close sea, was considered by our Government in 1822 to be against the rights of other nations.

Mr. Chancellor Kent was not in the habit of using either vague language or uncertain language. He describes it there as the claim of Russia to sovereignty; and I want to ask this Tribunal—I must not anticipate what I have to say later on in attempted reply to Mr. Phelps' argument, but I ask again, is there the vestige of an authority for the suggestion that the right to exclude other ships from navigating a belt of water along side, on the borders of, a coast, is otherwise than an act of sovereignty? Why, the very acts that we have got to discuss later on, the acts which are properly justified as municipal statutes, Acts of Parliament, in order to protect certain interests there, are a very much less exercise of the sovereign power of legislation, and are justified and supported by special considerations. But this was a claim to exercise exclusion, or to confiscate vessels if they came within 100 miles of the coast; and yet, knowing the stress of the position, counsel suggest that that was not the exercise of exclusive jurisdiction, but was what they are pleased to call a defensive regulation.

There is not, Mr. President, as far as I know, as far as my research has enabled me to trace out this matter, a vestige of an authority, in text-book, judgment or legal writer, to indicate that exclusion of vessels from a margin of the sea—absolute exclusion—is otherwise than an act of dominion and an act of sovereignty. Why, really, if you will look at the citation at page 141 of the United States argument, from Sir Henry Maine, you will find these words. I might refer to half a dozen authorities cited by Mr. Carter; but at the bottom paragraph of the citation from Sir Henry Maine, you will find this:

At all events, this is certain, that the earliest development of maritime law seems to have consisted in a movement from *mare liberum*, whatever that may have meant, to *mare clausum*—from navigation in waters over which nobody claimed authority, to waters under the control of a separate sovereign. The closing of seas meant delivery from violent depredation at the cost or by the exertion of some power or powers stronger than the rest. No doubt sovereignty over water began as a benefit to all navigators, and it ended in taking the form of protection.

And at page 146, quoting from the opinion of Sir Robert Phillimore, in Queen *v.* Keyn:

According to modern international law it is certainly a right incident to each state to refuse a passage to foreigners over its territory by land, whether in time of peace or war. But it does not appear to have the same right with respect to preventing the passage of foreign ships over this portion of the high seas.

And the passage, Mr. President, which I referred to just now is at page 40 of the same book, where in his argument upon this question, Mr. Carter states it in this way:

Russia never at any time prior to the cession of Alaska to the United States claimed any exclusive jurisdiction in the sea now known as Behring Sea, beyond what are commonly termed territorial waters. She did, at all times since the year 1822, assert and enforce an exclusive right in the "seal fisheries" in said sea, and also asserted and enforced the right to protect her industries in said "fisheries" and her exclusive interest in other industries established and maintained by her upon the islands and shores of said sea, as well as her exclusive enjoyment of her

rade with her colonial establishments upon said islands and shores, by establishing rohibitive regulations interdicting all foreign vessels, except in certain specified nstances, from approaching said islands and shores nearer than 100 miles.

Now, Mr. President, let us just for a few moments consider what the ssertion of Russia was; and I will ask you once more to turn to the anguage of the Ukase of 1821, which will be found on page 38 of the 3ritish case. The statement is as conveniently set out there as at any ther place.

Section 1. The pursuits of commerce, whaling, and fishery, and of all other industry, n all islands, ports, and gulfs, including the whole of the north west coast of Amerca, beginning from Behring Straits to the 51st of northern latitude; also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands, rom Behring Straits to the south cape of the Island of Urup, viz., to the 45° 50′ orthern latitude, is exclusively granted to Russian subjects.

Section 2. It is therefore prohibited to all foreign vessels not only to land on the oasts and islands belonging to Russia, as stated above, but also to approach them ithin less than 100 Italian miles. The transgressor's vessel is subject to confiscation, ong with the whole cargo.

Senator MORGAN.—Does anybody know whether there is a "comma" front of the words, "beginning from Behring Straits", in the original xt?

Sir RICHARD WEBSTER.—In this copy there is a comma in front of e second "Behring Straits". There is no comma at the first one. It , "beginning from Behring Straits to the 51st degree of northern latide"—on the eastern side; and "from Behring Straits to the south pe of the Island of Urup"—on the western side. That was the claim Russia.

Senator MORGAN.—The question I had in my mind was whether that as not a new description of the North-West Coast, adopted by Russia.

Sir RICHARD WEBSTER.—No—"from Behring Straits to South of 1° north latitude", is the same description. It is new in one sense—at there are four or five others suggested in the course of the argument y my friends. It is no new description as far as we are concerned—is the description of the North-West Coast of America, as far as I now, that prevailed throughout.

Senator MORGAN.—The "North-West Coast of America" might, in certain aspect of the subject have referred to a limited portion of the ore.

Sir RICHARD WEBSTER.—Perfectly true.

Senator MORGAN.—Whereas, in giving an implied latitude to the ant of privilege there, they might have made it more specific by ying the "North-West Coast of America", and then make a new finition, giving the beginning of it.

Sir RICHARD WEBSTER.—The words are "the whole of the Northest Coast of America"—perfectly true; and if there be a document—d I hope this will not be forgotten—giving another meaning to orth-west coast", at any stage of this correspondence, I will read it course, and not only read it, but will point out, (if there be such a cument) its full meaning against me. But I must in deference to at you have been good enough to put to me—say that I assert again, m the time of the Ukase, down through the whole history, to the ssion in 1867, there is not a document that suggests that "Northest", had the limited meaning.

Now my friends say this: "It is perfectly true that the Ukase did clude the whole North-West Coast: It is perfectly true that the kase did include the whole Pacific Ocean and Behring Sea—(I am ing that expression so as not to be thought to be begging it against

them—what they call the "Pacific Ocean", and Behring Sea)—but the Treaty did not, and therefore, you, Great Britain acquiesced in the claim of Russia in Behring Sea". Is that true, or is it not, Mr. President? I do not wish to do an injustice, if I can avoid it, to my friend. I will read two passages from the Counter Case and Argument which make this clear.

At page 19 of the Counter Case they say this:

The Ukase of 1831 evoked strong protests, and the character of these protests is explained at pages 50 and 51 of the Case of the United States. It is further pointed out at pages 52 and 53 that in the treaties resulting from these protests a clear distinction is intended to be drawn between the Pacific Ocean and Behring Sea, and that by formally withdrawing the operation of the Ukase as to the Pacific Ocean, but not as to Behring Sea, a recognition of its continued operation over the latter body of water was necessarily implied.

Now there is nothing much stronger than this assertion which they have attempted to prove—that inasmuch as the Treaties themselves, either on their face or by looking at documents which Great Britain could not deny—either from the Treaties and those documents, "Pacific Ocean" does not include "Behring Sea"; "North-West Coast" does not go further north than 60°. Therefore there is an ample recognition of the continued operation of the Ukase of 1821 over Behring Sea and over the North-West Coast, north of 60°.

Now Mr. President, I must address myself to this point, having full regard to the nature of this Tribunal, and not being able to dismiss it in the summary way that I should in an ordinary Court of Justice in our Country. Mr. Carter tells me that the United States Counsel are not quite in the same position as we are, but that the opinion of United States Counsel is supposed to give validity to arguments; therefore they also vouch them, and therefore I must deal with this matter. I find at page 36 of the United States Argument, this statement:

In the view of the undersigned, Mr. Blaine was entirely successful in establishing his contention that the assertion by Russia of an exceptional authority over the seas, including an interdiction of the approach of any foreign vessel within 100 miles of certain designated shores, while abandoned by her treaty with Great Britain in 1825—

I ask the Tribunal to notice this—

as to all the northwest coast south of the 60th parallel of north latitude, was, so far as respects Behring Sea, and the islands thereof, and the coast south of the 60th parallel,—

that is a mis-print, it is "*north* of the 60th parallel"—

never abandoned by her, but was acquiesced in by Great Britain.

It would have been more satisfactory to us (and I think it would have been more satisfactory to the Tribunal), if inasmuch as a definite finding in favor of the United States is asked on this point, Mr. Carter had found it possible to have indicated to us what the arguments were in support of that complete success of Mr. Blaine; but inasmuch as I am determined, at any rate, that the Tribunal shall know the exact position, will they give me their kind attention for a few moments while I endeavour without one word of colour of my own, to show that the confidence in the success of Mr. Blaine was not such as Mr. Carter has thought fit to indicate at page 36; and I will ask the Tribunal (if I am not unduly trespassing on them), to turn to Appendix II to the British Case, because the few documents I have to refer to happen to be set out *verbatim* there.

[turn, first, to part 2 page 1. I am not going to read the letter, but m going to state, Sir, what it contains. It is the first announce-nt from the Chevalier de Poletica to the Secretary of State of the ited States. It is under date of the 28th February 1822.* In that ter the expression "North-West Coast", occurs six times. We are t now on the question of a charter to a company—we are not now on question of privileges given to individuals—we are on the question international negotiations, and there is not less good faith between tions than there is between individuals. The phrase "North-West ast" is used six times. In every instance it is used of the coast tending from Behring Straits to whatever point in the south the ssian dominion went to.

Therefore, upon the question of what "North-West Coast" meant in opening letter to the United States dealing with these negotiations, Iorth-West Coast" has a distinct and recognized meaning.

What about "Pacific Ocean?" "Pacific Ocean" occurs several ies, but I will call attention, if you please, Sir, to the passage on ge 3 near the end of the letter:

> ought, in the first place, to request you to consider, Sir, that the Russian posses-s in the Pacific Ocean extend on the North-West Coast of America from the ring Straits to the 51st degree of north latitude.

No Russian minister has ever attempted to put upon this language the nstruction my friends seek to put upon it. According to my friend, . Carter, the bargain which followed out this negotiation, without y change of expression, is to be supposed to have intended a different aning to these words. When that negotiation commenced, "North-est Coast" had a distinct and definite meaning for the purpose of that gotiation. "Pacific Ocean" had a distinct and definite meaning for purpose of that negotiation. The two are consistent. If "North-est Coast" means the *lisière* only from 60°, then "Pacific Ocean" does t include Behring Sea. If "North-West Coast" does go up to Behring raits "Pacific Ocean" does include "Behring Sea", and I am not over-ting the case as you will find—in every single instance in which that urs in that letter those are the meanings of those words.

Now that is the opening of the negotiations with the United States. w let us look at the opening of negotiation with Great Britain.

Would you be good enough to turn back to page 1 of the first part—s the letter from Baron Nicolay to the Marquis of Londonderry. It n French, but perhaps I ought to refer to the two letters—Baron de olay's of the 31st October, including Count Nesselrode's of the 7th ober. They are at pages 1 and 3 of the first part. They are both French, but any member of the Tribunal who will kindly run his eye rn will be able to see the words in a moment in several places: *Les s nord-ouest de l'Amérique appartenant à la Russie; les côtes nord-st de l'Amérique: La côte nord-ouest de l'Amérique, depuis le détroit Behring jusqu'au 51°.*

Then turning over the next page you will see:

lette partie de l'Océan Pacifique, que bordent nos possessions en Amér-e et en Asie.—

t is, the Pacific Ocean which bounds our possessions in America and Asia. And further down in the same letter there is another reference the Pacific Ocean.

Now this letter of the 7th October, from Count Nesselrode to Count ven, again has many references both to the North West Coast and Pacific Ocean, and again occurs the phrase. *Les possessions Russes r les côtes nord-ouest de l'Amérique et nord-est de l'Asie.*

And then again: *La côte nord-ouest de l'Amérique, depuis le détroit de Behring jusqu'au 51 de latitude septentrionale*—a further reference to the Pacific Ocean. Therefore, in the documents which open the diplomatic negotiations these words are used, and used in the only sense in which they could be used, as meaning the whole "North-West Coast", the whole of the "Pacific Ocean". Is there less good faith between nations than between individuals? I am to be followed by one whom I know to be a great lawyer and advocate and diplomatist. Will my friend, Mr. Phelps, suggest—I know he will not—that good faith between people who are negotiating, between nations, is less than between individuals? If anything—if there could be such a difference of standard—it should be higher; but at any rate it should be as high.

Now, Sir, the position of things is this—that had this been an ordinary contract between individuals and you wanted to turn round and say: It is quite true that we began the negotiation understanding what we meant by "Northwest coast": it is quite true that we began the negotiation understanding what we meant by "Pacific Ocean", but in the course of the negotiations those words acquired a different meaning: "North-West coast" no longer meant what we called it "from Behring Straits to 51°", it only meant "from 60° to 54°". "Pacific Ocean" no longer meant what we called it, it only meant "that part of the Pacific Ocean which is south of the Aleutian Islands".

I will appeal to any judge—to any one who has any judicial or legal experience. Assuming that a negotiation between individuals starts with both parties understanding "Pacific Ocean", and "North-West Coast," as meaning what I have said, and one of the parties after the contract turns round and says: "Oh no, when I made the contract with you I meant something quite different by those two expressions", what is the first thing a judge would say? It is: "Where, in the course of the negotiations did you ever call the attention of the other party" to the fact that you were using the expressions in a different meaning? I hope I have made my point clear to your mind, Mr. President—I do not wish to repeat myself—I say, starting in October 1821, through the whole course of these books (and all the original documents are here), there is not a trace of the suggestion of a change of meaning in either "North-West Coast" or "Pacific Ocean", so that the point which Mr. Senator Morgan was good enough to put to me for my consideration tells in my favour, because they were using words in a meaning perfectly well known to the parties. But is there anything the other way?

Mr. Justice HARLAN.—Will you let me ask you, Sir Richard, if it will not interrupt you, what do you think Mr. Adams meant in his letter to Mr. Middleton of July 22nd when he said "the Southern Ocean"?

Sir RICHARD WEBSTER.—To what page are you referring, Judge?

Mr. Justice HARLAN.—To page 141 of vol. I of the Appendix to the Case of the United States.

Sir RICHARD WEBSTER.—To what passage, Judge, might I ask?

Mr. Justice HARLAN.—The third paragraph.

Sir RICHARD WEBSTER.—The paragraph commencing: "The United States can admit no part of these claims"?

Mr. Justice HARLAN.—Yes.

Sir RICHARD WEBSTER.—It says:

The United States can admit no part of these claims. Their right of navigation and of fishing is perfect, and has been in constant exercise from the earliest time after the peace of 1783, throughout the whole extent of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions, which so far as Russian rights are concerned are confined to certain islands north of the fifty-fifth degree of latitude, and have no existence on the continent of America.

I may tell you, Judge, that I am very much obliged to you for point-
ıg it out to me—it fits in exactly with the point I was going to have
rged to you later on. At this time it was a recognized principle—
hen I say recognized it was a principle of international law—I do not
ally know that it does not prevail up to the present time—but at this
me it was a recognized principle of international law that you might
nd on unoccupied coasts, in the course of general rights of fishing
ıd navigation. Would you kindly look again at that book. I am
ıing to read from page 10 of the 2nd part of the same book with refer-
ıce to Mr. Justice Harlan's point which he was good enough to put to
e. This is a letter from Mr. Forsyth who was Secretary of State.

Mr. Justice HARLAN.—The letter is from Mr. Forsyth, Secretary of
ate to Mr. Dallas.

Sir RICHARD WEBSTER.—The second paragraph of the letter is this
ee Appen II B. C. part 2 p. 10):

The 1st article of that instrument is only declaratory of a right which the parties it possessed, under the law of nations, without conventional stipulations, to wit, navigate and fish in the ocean upon an unoccupied coast, and to resort to such ast for the purpose of trading with the natives.

I do not know, Judge, whether you know that the same claim was
ade by the United States much later in connection with the Falkland
lands. It was at this time—I do not know that it is not still—sup-
ɔsed by international law that you could land upon an unoccupied
ıast, and without any grant or permission for the purpose of trading
ith the natives; and speaking of that, Mr. Wheaton at page 171
ferring to this very trading says:

Admitting that this inference was just and was in contemplation of the parties to e convention—

That is about the ten years:

would not follow that the United States ever intended to abandon the just right knowledged by the first article to belong to them under the law of nations *i. e.* frequent any part of the unoccupied coasts of North America, for the purpose of ıing, or trading with the natives.

Now, my answer to you, Mr. Justice Harlan, is this;—That Mr.
lams, when he wrote on the 22nd of July, said: we cannot admit your
ritorial claims down to latitude 51°; we cannot admit your right to
ɔvent us from navigating and fishing, for the only possessions that
ı have occupied are certain Islands north of the 55° of latitude, and
ɪrefore he was again referring to what he believed to be the true view
international law, that, if the Russians had got no occupation, they
ıld not prevent other nations from landing.

Mr. Justice HARLAN.—I do not think you quite appreciated my object
asking that question, Sir Richard. In the paragraph before, Mr.
.ams describes the protection of territorial jurisdiction "from the
h degree of North latitude on the Asiatic coast to the latitude of
North on the Western coast".

Sir RICHARD WEBSTER.—You will observe, Judge, that no Northern
ıit is mentioned.

Mr. Justice HARLAN.—Yes.

Sir RICHARD WEBSTER.—It goes up to Behring's Straits.

Mr. Justice HARLAN.—

nd they assume the right of interdicting the navigation and the fishery of all er nations to the extent of 100 miles from the whole of that coast.

Then he proceeds to announce what he understands to be the prin-
ıal rights of navigation and fishing of the citizens of the United
ates throughout the whole extent of the Southern Ocean.

Sir RICHARD WEBSTER.—That is the same thing as the "Pacific".

Mr. Justice HARLAN.—That is what the object of my question was,—to know, when he used the words "Southern Ocean", whether he meant by that phrase to include the waters of Behring Sea up to Behring Straits?

Sir RICHARD WEBSTER.—Most certainly. I am extremely obliged to you, Judge, for this, or any other question. If it be necessary to demonstrate that, I can demonstrate that the "Southern Ocean" and the "Pacific Ocean" were used as interchangeable terms repeatedly at this time; and my point is, in reference to Mr. Adams' letter, that there is not a word to suggest that he stopped at 60°.

I did not mean myself to refer to this letter, because I was treating the correspondence as a whole; but there is not a word to indicate that he stopped at 60°, according to Mr. Carter's contention,—that they were giving up any right, not only with regard to Behring Sea, but anything which was to the north of that point 60°. All I say is this, that no other construction can fairly be put on that language at the present time. And I think, Sir, there is conclusive proof of what I am saying. I need not trouble you to look at it, but in Volume I of the Appendix to the British Counter Case is set out a letter from Mr. Adams to Mr. Rush, on the same date, the 22nd of July, 1823, to which you referred me. Mr. Rush was the Minister to Great Britain, and, in the last paragraph but one from the bottom of page 56, it says:

> By the Ukase of the Emperor Alexander of the 4th (16th) September, 1821, an exclusive territorial right on the north-west coast of America is asserted as belonging to Russia, and as extending from the northern extremity of the continent to latitude 51° and the navigation and fishery of all other nations are interdicted by the same Ukase to the extent of 100 Italian miles from the coast.

I need not say that Mr. Adams would not refer to the Ukase in two letters written upon the same day referring to it as excluding Behring Sea in one, and including it in the other. In the paragraph above that to which I call attention, he quotes the Ukase as being the claim of exclusive jurisdiction from the 45th degree of north latitude on the Asiatic coast to the 51st degree north on the American continent. He is coming all the way round, and then he refers throughout to the whole extent of the Southern Ocean, and many people at that time spoke of the "Pacific Ocean", as being the *Southern Ocean*, because they got to it by coming round Cape Horn. Now I pass on, having, I hope, not improperly endeavoured to answer the question you were good enough to put to me. My point is, that those are the still meanings of those words. Do they change it? Will you be good enough to turn over to page 63 of the first part of vol. 2 of the Appendix to the British Case? Here, at least, I am upon safe ground. The first letter I read, Mr. President, was on October 21st.

The PRESIDENT.—On page 63 it is not a letter, but a draft.

Sir RICHARD WEBSTER.—The actual letter is given on page 61, but to save you trouble, I was giving the page where you would find the actual document I was going to refer to. The document is a draft convention enclosed in a letter of the 12th June 1824 nearly three years—you will follow me—after the letter of October 1821. What did Great Britain understand by "Pacific Ocean"?—what did Great Britain understand by "North-West Coast" at this time? This is supposed to be, according to my friend, a communication of people who were using "north-west coast" and "the Pacific Ocean" in different senses to those which I have indicated were put upon them when the negotiations commenced. Will you kindly look at the page to which I call attention—

3. (Part. 2, Appen II B. C.) I will read the English transla- though both the English and French texts are cited side by side.

:

greed between the High Contracting Parties that their respective subjects by the right of free navigation along the whole extent of the Pacific Ocean, nding the sea within Behring's Straits.

a little strong to suggest that the people who made the Treaty onths after this were not getting the right of navigating and in Behring Sea when they were writing on July 24th, and there he expression Pacific Ocean in the sense of the sea extending p to Behring Straits so as to include the sea within Behring Would you kindly turn, if I am not unduly trespassing upon the *contre-projet* which is given in French, and you will find it beginning of page 65, there you will find no suggestion from that Great Britain was using "Pacific Ocean" or "north-west n a different meaning. On the contrary, the objection taken to guage, as you will remember,—the Attorney General called your n to it—was not because Russia did not wish to give a right of ing in Behring Sea, but because they thought that the *contre-* ight give a right to visit places north of Behring Straits, and to be supposed that the parties were negotiating, having again imit to the ordinary words "Pacific Ocean" and "North-West

HANNEN.—The 7th Article, as it appears to me, must point to at the Russians treated the Pacific Ocean as reaching up to g Straits.

ICHARD WEBSTER.—Yes.

HANNEN.—I think it is absolutely demonstrated that that is so e three Articles V, VI and VII. It draws a distinction in the between the Pacific Ocean up to Behring Strait, and the sea

isseaux Britanniques et Russes naviguant sur l'Océan Pacifique et la mer indiquée

is the sea to the north of Behring Strait.

t forcés par des tempêtes, ou par quelque autre accident à se réfugier dans respectifs, pourront s'y radonber et s'y pourvoir de toutes choses nécessaires, ettre en mer librement, sans payer aucun droit hors ceux de port et des qui n'excèderont pas ce que payent les navires indigènes.

at the end the expression is, "où il aura abordé".

ICHARD WEBSTER.—Yes. Would you look at Article VI, which

vant il ne pourra être formé par les sujets britanniques aucun établisse- sur les côtes ni sur la lisière du continent comprises dans les limites des ns Russes désignées par l'Article II.

every document I might take up out of some forty or fifty, the bservation might be made. I might say here—I do not court ption—I am only giving notice to my friend Mr. Phelps—that not one single document of all these in which the more limited g is put on "North West Coast"; and, therefore, although I deavored to pick out the striking ones, they are by no means y documents that support my contention. It is the fact that in tions extending for years between three great Powers—Russia United States: Russia and Great Britain—there is not a trace contention made for the first time by Mr. Blaine in the year answer to Lord Salisbury.

Mr. Justice HARLAN.—Let me put this to you in that connection, if I am not interrupting. I understand both sides to contend, or to admit that Russia did not intend, by the ukase of 1821, to close Behring Sea, and that she was not so understood by either side at the time as intending to close Behring Sea, although Mr. Canning suggested that a limit should be put.

Sir RICHARD WEBSTER.—You must exclude Behring Straits, Judge. It would have closed it on the North. I am speaking of closing it from the South.

Mr. Justice HARLAN.—I understand that. Mr. Canning said the application of that 100-mile limit would close Behring's Straits.

Sir RICHARD WEBSTER.—Certainly.

Mr. Justice HARLAN.—And, therefore, would keep British vessels out of the Arctic Sea. Now. if Russia did not intend to close Behring Sea or interfere with navigation in it anywhere outside of the 100 Italian mile limit, and neither side understood her as doing more than that, why should they have had in mind any terms in the different *projets* or in the Treaty towards securing equality of rights in Behring Sea?

Sir RICHARD WEBSTER.—For two reasons. In the first place, because, whether it closes Behring Sea or not, the 100-mile limit would have practically excluded ships from a vast portion of Behring Sea, as to which the Duke of Wellington and others objected most strenuously, and the United States too. It was not a question of closing the Sea only, but a vast portion of Behring Sea.

Mr. Justice HARLAN.—But neither the United States nor Great Britain had any settlements on the Behring Sea coast.

Sir RICHARD WEBSTER.—It was not a question of settlements.

Mr. Justice HARLAN.—Or any trade.

Sir RICHARD WEBSTER.—I do not at all agree that they had not any trade—it is not a question of settlements. I have read to you, in answer to your question, a few moments ago, the statement made by the United States official, that at that time the right of navigation, was considered by international law as giving you the right to trade with natives where there was no occupation of the coast by the dominant Power. I read Mr. Forsyth's letter, and I read from Wheaton; and I could find you many traces of that in the other diplomatic correspondence.

Senator MORGAN.—Has that rule or principle of international law gone out of use?

Sir RICHARD WEBSTER.—I referred to that a few moments ago, Sir. With regard to the Falkland Islands in 1835 certainly the United States contended that they, as far as the Falkland Islands were concerned,—I am not so sure that it has absolutely gone out of use—

General FOSTER.—In that case it is not the fact that the United States admitted that it was no mans land—not as to Falkland Islands.

Sir RICHARD WEBSTER.—I beg General Foster's pardon. The United States said, (I will refer to the Case) that even if it belonged to the Argentine Republic we have by international law a right of fishing in the high seas and the right of landing at unoccupied places on the Coast. I must call attention to it, but I must keep myself to my point. I do not at all complain of the interruption.

Senator MORGAN.—My point was that it seemed to me from the argument here on both sides that international law, by which we are supposed to be compelled to be governed, has a formative growth and decay accordingly as it adapts itself to the necessities of mankind.

Sir RICHARD WEBSTER.—By the assent of Nations undoubtedly-

enator MORGAN.—But how are we to ascertain whether the assent ıations has been obtained?

ir RICHARD WEBSTER.—If there have existed at starting rights ch have not been interfered with.

enator MORGAN.—The question comes back, how long would it take ɜstablish a principle of international law, and how long would it e for that principle to die out?

ir RICHARD WEBSTER.—You talk of a short time and a long time ɔrding to the acts of Nations and according to the evidence of uiescence; but I am sure, Senator, you do not want me to be taken ıy from my point, because it is really important that I should make point clear without discussing collateral matters; but I promise not forget your observations. My point was (you will forgive me for eating it), that throughout the whole of this correspondence the igation of Behring Sea up to the Straits is the basis upon which y are negotiating.

low the only other document my friend, Mr. Carter, thought worthy notice was Baron Tuyll's note; and I care not, whether I refer to the ginal French, or the translation. The original French is at page of the British Counter Case; the translation is at page 276 of United States Appendix, volume 1. Now here you would have ɔected that if the meaning of the words North West Coast now ggested was correct you must have found something pointing to it. ead from the translation:

xplanatory note to be presented to the Government of the United States at the e of the exchange of ratifications with a view to removing with more certainty occasion for future discussions, by means of which note it will be seen that the utian Islands, the coasts of Siberia, and the Russian possessions in general on the th-West Coast of America to 59° 31′ of north latitude are positively excepted, etc.

That is on the North-West Coast of America,—from what point? viously from Behring Straits. Does anybody mean to suggest that tarts at 60°? It is so obvious! From 60° to 59° 30′ is only 30 miles! es any man in his senses pretend that when they speak there of the rth-West Coast of America down to 59° 30′ they only meant to start 60° of latitude? This is the only document to which my learned nds can refer to indicate that there is some different construction upon North West Coast. We are supposed, says Mr. Carter, to e inherited this construction, are positively excepted from the lib- of hunting, fishing and commerce stipulated in favour of the citizens he United States for 10 years. I remind you that the 10 years clause for visiting interior seas, creeks and rivers, and trading at places hich there was a Russian establishment. It had nothing to do with rule of International law which permitted you to trade at places at ch there was no Russian establishment.

Ir. Justice HARLAN.—That was restricted to a certain part of that st.

ir RICHARD WEBSTER.—As far as the United States were con- ned it was not restricted to any part at all. I am obliged to you, Sir, putting the question to me. I asked you to remember to-day, that ɔetween the United States and Russia this *lisière* had no existence. s *lisière* was simply for the purpose of defining a boundary between eat Britain and Russia; so far as the United States were concerned ıad no existence. You will not find a trace of it in the Treaty, or a rd referring to it. What happened was this: Agreeing to 54° 40′, l that is the only latitude mentioned in the American Treaty, the ole of that coast was to be the subject of the Treaty. On that coast

for 10 years they are to have the right of visiting the interior waters, creeks and harbours. I will perhaps trouble you to-morrow morning by reading that clause again, but there was no limit whatever.

Mr. Justice HARLAN.—As you so kindly respond, I am tempted to ask you again to get at your precise meaning, Article VII of the Treaty with Great Britain says:

It is also understood that for the space of 10 years from the signature of the present Convention the vessels of the two Powers or those belonging to their respective subjects shall be mutually at liberty to frequent without any hindrance whatever all the inland seas, the gulfs, havens and creeks on the coast mentioned in Article III.

Now, when you turn back to Article III, does not that define and limit a particular part of that coast?

Sir RICHARD WEBSTER.—No, I am sure it was my fault, but I was not on the British Treaty. I will undertake to demonstate that point, but your question to me was the right of visit with regard to the United States. You will not find a single word in the United States Treaty corresponding with that. That happens to come into the British Treaty because of the *lisière* which I will explain, but I was reading to you from Baron de Tuyll's note which is before the British Treaty was made in 1825, and Baron de Tuyll's note was in December 1824. He there says:

It will be seen that the Aleutian Islands, the coast of Siberia and the Russian possessions in general on the North West Coast of America to 59° 30′—

that means from the North:

are positively excepted from the liberty of hunting, fishing, and commerce stipulated in favour of citizens of the United Seates for ten years.

Then:

This seems to be only a natural consequence of the stipulations agreed upon for the coast of Siberia are washed by the Sea of Okhotsk, the Sea of Kamschatka and the Icy Sea and not by the South Sea, mentioned in the 1st Article of the Convention of April 5/17 1824. The Aleutian Islands are also washed by the Sea of Kamschatka or Northern Ocean. It is not the intention of Russia to impede the free navigation of the Pacific Ocean. She would be satisfied with causing to be recognized as well understood and placed beyond all manner of doubt the principle—

Now will you kindly note this:

that beyond 59° 30′ no foreign vessels can approach her coasts and her islands nor fish nor hunt within the distance of two marine leagues.

Not any question here of any special privilege, but an attempt to get two marine leagues fairly enough. I do ask the attention of the Tribunal to this,—my learned friends will forgive me for using the word "absurd", I do not want to, but see what the result of their contention is. Baron de Tuyll is asked to say that from 59° 30′ in *this* direction you may only go within two leagues of the coast.

Mr. CARTER.—You mean he asks.

Sir RICHARD WEBSTER.—He is asked to say and he does say by his note that above 59° 30′ you may go within two marine leagues of the coast. Does any man in his senses suppose that when he asked above 59° 30′ he merely meant to confine that from 59° 30′ to 60°. It is absolutely inconsistent with the position of the North-West Coast ending at 60°.

The PRESIDENT.—Might it not be understood in this way: All that coast of the Aleutian Peninsula and Islands, the Southern portion being settled because it was approached in that way,—as you approach 59° 30′ if you go beyond you go along these Islands.

Sir RICHARD WEBSTER.—I have not the smallest objection to meet any argument of that kind.

The PRESIDENT.—Let me point out this: I am struck with it. The Aleutian Islands are also washed by the Sea of Kamschatka or Northern Ocean. If they are washed by the Sea of Kamschatka or Northern Ocean I suppose that means Behring Sea. They are washed on the southern Side by the Pacific on *that* Coast, and the Sea of Kamschatka or Northern Ocean on *that* coast. That is what we call Behring Sea. I do not understand any other possible construction of this passage.

Sir RICHARD WEBSTER.—I do not know what was in the mind of the person who framed this note which was never communicated to Great Britain (that is proved to demonstration). I am not considering whether the arguments in this note were well or ill founded,—I am not considering whether Northern Ocean meant Behring Sea or was another name for the North Pacific Ocean, but I point this out that it is conclusive against Mr. Carter's contention.

The PRESIDENT.—The Northern Sea is used in opposition to the South Sea.

Sir RICHARD WEBSTER.—I am not so sure.

The PRESIDENT.—It is a strange wording.

Sir RICHARD WEBSTER.—I will accept it, but it does not touch my point.

Mr. Carter has told you that in his opinion he is satisfied that Mr. Blaine was successful in the contention that the Pacific Ocean was excluded, and he further told you that for the purpose of this Treaty North West Coast was to be confined from latitude 60° down to 54° 40′—the *lisière:* I need not mention that again. My point is that Baron de Tuyll's document is conclusive against that, because to tell us that these great nations were fighting about 30 miles of country was childish,—nobody with any knowledge of diplomacy could suggest it. The position is that the Russian Company were seeking to get the 10 years permission stopped at 59° 30′, not saying the words limited it, not saying the clause did not give the United States the right, but trying to get the 10 years clause stopped at that point, because the *lisière* discussion had arisen in between the time of the Treaty being agreed to in April 1824 and the date on which Baron de Tuyll's letter was written.

The PRESIDENT.—Will you allow me to state that I do not think that it is fair to consider as a principal of International law that there is any right (at least to-day and I do not think it ever was previously) of landing upon an unoccupied portion of any coast which belongs to another nation. There may be a question between occupation and possession.

Sir RICHARD WEBSTER.—That is the ground of it.

The PRESIDENT.—But where there is possession if there is not actual occupation, the Sovereign nation who has that possession has the right of doing whatever she likes with it.

Sir RICHARD WEBSTER.—I think for the last 20 years that certainly has been the rule; but there are plenty of indications that up till 20 or 30 years ago it was not so clearly understood.

Lord HANNEN.—And even then you will find it was based on possession.

The Tribunal then adjourned till to-morrow at 11.30.

Sir RICHARD WEBSTER.—Mr. President, I wish as briefly as possible to conclude what I have to say on this question of the Treaties. Perhaps I ought not to pass on without saying one word more about Baron de Tuyll's note. It has nothing but a historical interest in this case; absolutely nothing, as it is not suggested that it was ever communicated to Great Britain; and I shall show you in a moment that that is placed on record at the time. But that there must have been some mistake in the language of the note to which you called my attention yesterday, is obvious if you regard the genesis and history of the document. If I am not trespassing too much on your kindness, I will ask you to turn to page 34 of the 1st volume of the Appendix to the British Counter Case, where you will find, what I may call, the genesis or original beginning of this document. May I remind you what had happened?

The Treaty of 1824, that is the United States Treaty, had been agreed to, but not ratified, in April 1824; it was ratified actually in January 1825. A copy of it was sent to the Company,—the Russian American Company; and it gave rise to a Conference which was held in July 1824, at which Count Nesselrode was present, and it was out of this Conference or from the proceedings at it that Baron de Tuyll's note ultimately sprung. The note was mentioned first in December 1824, and delivered in January 1825, in consequence of the discussion which had arisen at this Conference.

Now, Mr. President, if you will look at page 34, paragraph 7, taking the corrected and revised translation supplied us by the United States, you will see the origin of the sentence which ultimately found its way into Baron de Tuyll's memorandum; and it shows what very little care had been taken in preparing that memorandum, and how, practically speaking, it was a document to which no substantial attention was paid. The end of paragraph 7, you will notice, reads in this way.

> Moreover, the coast of Siberia and the Aleutian Islands are not washed by the Southern Sea, of which alone mention is made in the 1st article of the Treaty, but by the Northern Ocean and the seas of Kamchatka and Okhotsk, which form no part of the Southern Sea on any known Map or in any Geography.

It is quite clear that what they were speaking of there as the Northern Ocean is the *Mer glaciale* above the Behring Straits; but when the "note explicative" came to be prepared, on the face of it it is very difficult to understand exactly what it means, but it is quite clear the person who prepared it had not followed the actual directions of this representation from the Conference, but prepared a note embodying, as he thought, practically that which was what I may call the suggestion made by the Dignitaries.

It is curious, Mr. President, to note that in the original translation sent us by the United States, if you will kindly look at the end of paragraph as it originally stood, it had been translated as "Arctic Ocean" and not "Northern Ocean." If your eye goes across the page

he bottom of the original paragraph 7 as sent to us, the translation re was—

ut by the Arctic Ocean and seas of Kamschatka and Okhotsk.

nd I should think it extremely probable that the Russian word ld admit of either translation. But it makes no difference for my pose. I am calling attention to the fact that this document (never mmunicated to Great Britain) an attempted protest by the Russian npany to try and get a restriction upon the ten years licence, umed the form that not unnaturally caused you, Sir, a little doubt as ts meaning from the person who prepared it not having followed the ual language of the representation. As it reads in the French or extract, I read from Mr. Blaine yesterday at page 227, a full stop is after the words 1824 and the sentence begins.

he Aleutian Islands are also washed by the sea of Kamchatka or Northern Ocean.

pass from it with this concluding observation which is I am afraid epetition, that the document formed no part whatever of the nego- ions between Great Britain and Russia, and so far as the United tes are concerned it is a distinct confirmation of what was the mean- of the language of the Treaty as it was originally understood. For s document was intended to be, and was, an attempt by the Company get a limited and restricted meaning put upon clause IV.

Now there are only a few matters in this connection to which I need l attention, and I do so in deference to a question put to me yester- y by Mr. Justice Harlan. I will ask the Tribunal to be good enough look at the two Treaties as they are together at page 52 of the British se. It is the most convenient form because they can then be com- red without the trouble of referring to more than one book.

Mr. Justice HARLAN.—Before you leave that may I ask whether it pears in the Case that the terms of the Treaty of 1824 were known to eat Britain when the treaty of 1825 was made.

Sir RICHARD WEBSTER.—Yes, known and adopted by Great Britain being a conclusive answer to the attempt that was being made by ssia to get her to agree to other terms. After the 1824 Treaty had n agreed to Russia tried to induce Great Britain to limit her right visiting during the term of ten years to the lisiere. Russia tried, as ill show you, by two documents, to get Great Britain to accept a less ht of visiting than the United States had acquired. While that otiation was going on the British Ministers received the American aty, upon which they put identically the same construction which ry body else, up till this argument, has put upon it: namely that it not limit the North West Coast to 59.30; and, in consequence, upon ground that Great Britain could not be forced to accept less than United States, they adopted that language without a suggestion le, or a single scintilla of a suggestion, that these rights were ited, and Great Britain was only getting a right to the North West st, as they are now pleased to call it, up to latitude 60, or anything .

Mr. Justice HARLAN.—One other question. The United States aty describes it as "the Great Ocean, commonly called the Pacific an or South Sea".

Sir RICHARD WEBSTER.—Quite right.

Mr. Justice HARLAN.—The British Treaty describes it as "any part the Ocean commonly called the Pacific Ocean". The French of that aty has the word "Grand" in it.

Sir RICHARD WEBSTER.—I quite understand.

Mr. Justice HARLAN.—That is not material to the question I was about to ask. Have you any doubt that Great Britain intended by the Treaty of 1825 to cover precisely the same waters that the United States Treaty of 1824 covered.

Sir RICHARD WEBSTER.—Not the slightest doubt. It is my contention that Great Britain intended to get so far as coast rights were concerned, and so far as navigation and fishing rights were concerned, what the United States got.

Lord HANNEN.—I think that that requires some little modification. They intended to get all they believed the American negotiators had got. If they were mistaken as to what the American negotiators had got, that would not alter it.

Sir RICHARD WEBSTER.—Not in any way. Perhaps, my Lord, I had not expressed myself accurately, but I understood the Judge to be referring to the words of the Treaty.

Mr. Justice HARLAN.—That was all.

Sir RICHARD WEBSTER.—Not to anything behind it other wise my answer would have been different.

Lord HANNEN.—They thought they were getting that which, according to their interpretation, the United States had got.

Sir RICHARD WEBSTER. That is what I meant.

Mr. Justice HARLAN.—The only object of my enquiry was, to ascertain whether in your judgment the words in the Treaty of 1825 "in any part of the Grand Ocean commonly called the Pacific Ocean were" to receive any different interpretation from the words of similar import in the Treaty of 1824, by reason of the fact that the words "South Sea" were not mentioned in the one of 1825.

Sir RICHARD WEBSTER.—No difference at all.

[The President of the Tribunal here consulted with Lord Hannen, and Mr. Justice Harlan.]

Senator MORGAN.—Mr. President, I desire respectfully to suggest, with reference to a consultation between a portion of the members of this Tribunal, occupying more than ten or fifteen minutes, that it would only be just to the balance of us that we should retire and have our consultation where all can be heard that is said.

Lord HANNEN.—I think it right that the Senator should understand that the conversation which arose between some members of this Tribunal, arose entirely from the President having put a question to those who are nearest to him on the subject.

The PRESIDENT.—We should, of course, certainly adjourn for our future decision. Whatever remarks we make in exchanging points of observation which takes place between us, if it has any bearing as to our decision we would, of course, make it known in our recess when we adjourn.

Senator MORGAN.—I supposed from the length of the conversation that it must necessarily have some bearing on this case, and when that is the fact I think the entire Tribunal ought to have the benefit of the observations that are exchanged between members of the Tribunal.

The PRESIDENT.—As we are approaching the end of our hearings altogether, perhaps it would be better not to bring in any new procedure. Personal observations exchanged between one member of the Tribunal and another are merely considered as quite informal. If there is anything in them which has any substance which may be useful to bring to notice before the final deliberation between us, you may be sure that we shall do so. These personal observations which have been

hanged were really for the private understanding of certain points ween different members of the Tribunal. I myself was in doubt as certain questions of fact, and I enquired from my neighbors what y thought of the two translations. Perhaps, Sir Richard, you will ceed.

ir RICHARD WEBSTER.—I understood, in the answers that I gave he learned Judge's question, that he was asking me as to what I call the geography of the matter,—as to whether I meant to draw distinction between "the part of the Ocean commonly called the ific Ocean" and, "the part of the Great Ocean commonly called the ific Ocean or South Sea" in the 1st Article of the United States aty. It was in that sense, and in that sense only, that I answered question. If there was something behind that I do not under- d, I am quite sure that the learned Judge will let me know. That ow I understood the question put, and that is how I answered it.

ow I will ask the Tribunal to look at the Treaty. I care not whether rk by the French or the English text myself; but I think I had er take the English so that all the Members of the Tribunal will w me more easily. If they will be kind enough to look at page 52 he British Case, there they will see an English version of the United es Treaty sufficiently accurate for my purpose,—at any rate, suffi- tly accurate to enable my point to be made clear. On the next e, you will find the British Treaty. It is a mistake to suppose that er Nation thought they were getting any grant under Article I,— I am confining my observations now to the United States Treaty: ther it be international law or not, now, both Nations in the years l and 1825 were contending, and contended for long after that time, by international law the right existed to land on unoccupied coasts; it is not necessary to go further with the language of this Article 1 nable one to see it. It says:

is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean, uth Sea, the respective citizens or subjects of the High Contracting Powers be neither disturbed nor restrained, either in navigation or in fishing, or in the r of resorting to the coasts, upon points which may not already have been pied, for the purpose of trading with the natives, saving always the restrictions conditions determined by the following Articles.

at was an agreement that the interference attempted by Russia the whole area as to which it had been attempted, should be with- vn and should be no longer persisted in. It was no grant; it was ermission—it was, in favor of the United States, a withdrawal of claims of Russia put forward by the Ukase of 1821, objected to by protest of the United States, no longer continued after the year

ow Mr. President will you look at the words of the next Article.

e PRESIDENT.—Do you believe that this first Article implied that sia had a property on the inhabited coasts?

r RICHARD WEBSTER.—I think the first Article implied that the ed States did not care to dispute Russia's title to the coasts, because will observe if I may say so—I am a little anticipating—that by the 1 Article they agreed to make no settlement north of 50° 40′. Of se the United States knew perfectly well that they could not deter- the question between Russia and other nations; but so far as the ted States were concerned they did not care about raising the ques- of whether Russia's rights to the coast above 54° 40′ could be dis- d. That is what my understanding of the Articles is.

The PRESIDENT.—You would construe that as recognizing an exclusive right of Russia to take possession, rather than an actual recognition of the actual property of Russia?

Sir RICHARD WEBSTER.—That I believe is the proper construction of this Article—recognizing a right of Russia without let or hindrance—by the United States, to take possession of the coast, without considering whether her possession up to that time was complete; and reserving to the United States the right by international law, which was then believed to exist, that in the absence of possession being taken—in the absence of Russian establishments—there was a right of trading with the nations, and, if necessary of landing for the purpose of trading. It was a recognition of rights and not a grant of any fresh rights whatever. It was in consequence of the action of Russia in 1821 necessitating protests by the United States, and necessitating the withdrawal by Russia of the claims which she had set up which would have interfered with the United States rights.

Now if you will let me read the second Article, you will observe that my first point comes out with greater clearness still there. It says:

> With a view of preventing the rights of navigation and of fishing, exercised upon the Great Ocean by the citizens and subjects of the High Contracting Powers, from becoming the pretext for an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian Establishment, without the permission of the Governor or Commander; and that, reciprocally, the subjects of Russia shall not resort, without permission, to any Establishment of the United States upon the north-west coast.

Now you will observe, Sir, from the point of view of future establishments, no fresh establishments were to be made by Russia south of 54° 40′—no fresh establishments were to be made by the United States north of 54° 40′. This clause shows that the rights of navigation and visit, (which were recognized as extending to unoccupied coasts), were not to be exercised where there was a Russian establishment, or United States establishment without communication with the Commandant of the respective Governments; and is inconsistent, as I shall show you in a moment, with any idea of this being limited to 54° 40′ or 60″, it being necessary that the right should extend all the way round that territory, and should be exercised, subject to the control of Article II all the way round that territory north of 54° 40′ right up to the Behring Straits which had been included in the Ukase.

Now will you look at Article III? It says:

> It is, moreover, agreed that hereafter there shall not be formed by the citizens of the United States, or under the authority of the said States, any Establishment upon the north-west coast of America, nor in any of the islands adjacent, to the north of 54° 40′ of north latitude.

Now do the United States Counsel contend that the north-west coast was limited in the Article? There was a vast extent of coast running away to the west of where you find there the pink colour, right down to the Aleutian Islands. According to the contention of Mr. Carter "north west coast", where it occurs in this Treaty, lies between latitude 60° and latitude, 54° 40′. Now I ask you whether this contention, never raised by Russia, never suggested by Russia, is to prevail in the face of that Article III where there is a prohibition against the United States for establishing a settlement on the north-west coast of America north of 54° 40′? What does that mean? That for good consideration, the United States agreed that they would not make fresh establishments from north of 54° 40′ right up to Behrings Straits, and, for that matter, beyond. It is not important for my purpose, because so far as we are now considering, up to Behring Straits is far enough.

The PRESIDENT.—Do you believe by that article that the United States forfeited the right to settle on the more southern Islands of the Aleutian group?

Sir RICHARD WEBSTER.—Certainly.

The PRESIDENT.—Yet they are not north of 54°.

Sir RICHARD WEBSTER.—That is exactly what I desire to bring out. They were dealing with the coast line and they were saying "There shall be a line drawn upon that coast at 54° 40′. They meant the United States settlement to stop at 54° 40′ and the Russian settlement to stop at the same line. That was the dividing point for them.

The PRESIDENT.—They speak of the Islands on that coast.

Sir RICHARD WEBSTER.—That is the observation I had in my mind. However, it is unimportant—*that* is why 54° 40′ came in.

The PRESIDENT.—It is not quite so unimportant, because your interpretation of this Article has to be taken together with your interpretation of what you said yesterday about the 59° 30′ parallel, when you said it could not certainly apply to the 30 miles remaining between 59° 30′ and 60°.

Sir RICHARD WEBSTER.—No.

The PRESIDENT.—I believe in the same way as you said to-day, that the people who made these Treaties were thinking of the coast line, and considered that going, say, from San Francisco all along the coast to Kadiak and the Unalaskan part they went on going north as it may be that they meant when they spoke of doing nothing above 59° 30′.

Sir RICHARD WEBSTER.—They may not have remembered that this peak came down so far. We do not really know whether the map was correctly plotted at that time.

The PRESIDENT.—That is how you interpret both cases?

Sir RICHARD WEBSTER.—Certainly.

The PRESIDENT.—And the one you mentioned yesterday.

Sir RICHARD WEBSTER.—But surely, if I may be allowed to say so—I do not want to justify myself—it is the strongest argument in support of what I said yesterday, that it was ridiculous, of course, to suggest that they drew any distinction between 59° 40′ and 60′ for this purpose. 59° 40′ and 60° for the purpose of a dividing line were practically the same from the point of view of the coast line.

Mr. Justice HARLAN.—Does it anywhere appear from the correspondence of either of the three Governments, that either Great Britain or America disputed the right of Russia to the Aleutian Islands or to any parts of the coast north of 59° 30′ or 60′?

Sir RICHARD WEBSTER.—I do not think it does except in this sense, Judge—that I think that in all probability there was not the amount of agreement as to what possession had, in fact, been taken by Russia; but I agree with the Attorney General that, from the British point of view, they were content to stop at 54° 40′ in the sense of 54° 40′ used by the President but a few moments ago.

The PRESIDENT.—You would not interpret all this Treaty as a delimitation of territory actually occupied, but rather of what you call today the sphere of influence.—that is the right ot taking possession.

Sir RICHARD WEBSTER.—Yes, I ought to say, if I was concerned to discuss it, in the beginning of the negotiation Mr. Adams distinctly. disputed it; but I was rather looking at the ultimate result of the negotiations than the preliminary discussion which seemed of less importance.

Now, I desire to call the attention of the Tribunal to Article IV.

It is, nevertheless, understood that, during a term of ten years, counting from the signature of the present Convention, the ships of both Powers, or which belong to

their citizens or subjects, respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbours, and creeks upon the coast mentioned in the preceding Article, for the purpose of fishing and trading with the natives of the country.

That was independent, so to speak, of what I may call the general right of trading with natives on unoccupied coasts. It was something which would apply to what may be called interior seas and waters of the territory in future to be recognized as Russian as distinguished from the United States.

Now, I desire, to the best of my power, to avoid repetition; but with reference to what you have been good enough to put to me, showing you were kindly appreciating my argument yesterday, what reason can be given for saying that that privilege stopped at latitude 60°—there is not a vestige of a trace of a suggestion of the kind in the correspondence between Russia and America, but for the purpose of this case to support an argument of Mr. Blaine which had better, when examined, have been abandoned, with all respect to my learned friend, Mr. Carter,—he puts it in his written argument, and says that the Northwest Coast is, because he says it, to be construed as being from 60° to latitude 54°, and so on, further south. May I ask to read one document which shows how Russia, at any rate, would never have attempted to put that construction on the language! It is not a diplomatic document, but still it is of equal importance because it emanated from Count Nesselrode. I mention it for the purpose of showing that our contention is no afterthought; but this coast is referred to by Russia with the meaning we put upon it and not the meaning that the United States put upon it. If you turn to page 30 of that same book, the 1st Appendix to the Counter Case, which you were good enough to refer to when I was speaking of Baron de Tuylls memoradum, you will find Count Nesselrode's letter of the 11th of April, 1823, which is written seven days after the Treaty was agreed and signed in the terms I read,—not ratified, but signed. It was done at St. Petersburgh on the 5th of April, 1824.

Now the letter of the 11th of April, 1824 (and I read from the revised translation), at page 30 of Vol. I Appendix to British Counter Case, about a dozen lines below the break which begins "having thus denoted" with reference to Article III of the American Treaty it is said:

In Article III the United States recognize the sovereign power of Russia over the western coast of America, from the Polar Seas to 54° 40′ of north latitude.

Sir, would you glance once more at the language of Article 3? "Any Establishment upon the Northwest Coast of America"; my learned friend, Mr. Carter, is driven from the necessities of his position to say that in Article III the "Northwest coast of America" means from 60° to 54° 40′; and Count Nesselrode speaking of it a few days afterwards says that it went to the Polar Seas. It is not too much to say that this contention could not have been made by Russia,—could not have been made by anyone who was not driven to the stress of supporting an untenable position taken up by Mr. Blaine in order to support a proposition,—the meaning of which the words do not permit of. You will not find any dispute about the northern boundary of the Russian possessions; and it is the key to the whole of this correspondence and this construction, that the United States were only anxious about the southern boundary and cared not a bit about the northern. Therefore, you find in this Treaty no trace of 59°, or 60°, or anything that corresponds to it.

The PRESIDENT.—Except for reserving the right of free navigation and trade on unoccupied points, which I would call rather a conventional arrangement than international law.

Sir RICHARD WEBSTER.—And you observe, from the point of view of the dividing line, it equally applies north and south of 54° 40′. 59° 30′ or 60° does not enter into this Treaty at all, and there is not one word on which my learned friends can hang their point.

I am glad to think that my points come out clearly as I go along, and not at too great length.

The PRESIDENT.—Might I beg to ask incidentally, what is the position of the United States as to the double translation of these documents published in the first Appendix to the British Counter Case? You see there are two translations.

Sir RICHARD WEBSTER.—The first was the original one sent us by the United States. The revised translation is also sent us by the United States. You will disregard the lefthand column altogether.

General FOSTER.—Of course, Mr. President, you must disregard it, because it is not now in the Case.

Sir RICHARD WEBSTER.—We were obliged to do it—the United States admit we were,—to call attention to the inaccurate translation. We could not help doing it; but we printed them, so that the eye might see where the inaccuracy occurred,—both the original and the revised.

Now, would you be good enough to turn back to page 11 (App. I B. C.C.) of that Appendix, and you will there find the explanation.

The lefthand column contains the translations originally furnished by the United States Government in Volume I of the Appendix to their Case. In the righthand column revised translations are given. Nos. 1 to 10, 12 to 15 having been withdrawn by the United States, the revised translations of these documents have been made for Her Majesty's Government from the *fac-similes* of the original Russian text annexed to the Case of the United States. Of the remainder, namely Nos. 11, 13, 14, and 16 to 31, the amended versions, recently supplied by the United States, have been adopted. Where any material differences between the original and revised translations occur the passages have been underlined, with the addition of brackets in the case of interpolations.

For my purpose, I accept the position taken by my learned friends; and I refer entirely to their revised translation.

Now, Sir, may I resume the thread of my observations; that, with reference to the Treaty itself, there is not a word in it upon which the contention of the United States now made can be founded. But it may be said, though that may be perfectly true, Great Britain understood it differently,—that Great Britain understood "Northwest coast" in the limited sense that the United States are contending for, "and therefore, we shall rely upon what Great Britain thought".

Here I would remind the Tribunal of my learned friend Mr. Carter's answer to Lord Hannen to be found at page 359 of the revised note. I need not trouble the Tribunal to look at it because I mentioned it yesterday. Mr. Carter was arguing, that because we had adopted the language of the 1st Article of the American Treaty, we must be taken to have inherited its limited meaning; and Lord Hannen puts this to Mr. Carter:

Would you say the English Government was bound by the interpretation which you say had been put upon it by the Russian and American Governments if the correspondence between the English Government and the Russian Government shewed that they understood the words "Pacific Ocean" in a different sense?

And my learned friend, Mr. Carter says:

No, my Lord, I would not in that case.

And, of course, one would have expected Mr. Carter to have made that answer.

Now I will complete what I have to say about these Treaties by showing that beyond all question the British Government did not under-

stand either Pacific Ocean as excluding Behring Sea, or North-West Coast as limited to what was south of latitude 60, and will the Court be good enough to take the volume I had yesterday, Appendix 2 to the British Case, and let me put two letters which, in my submission, put this matter beyond the slightest question, and to which I crave the attention of my learned friend, Mr. Phelps, when he comes to reply. You will remember, Mr. President, that I yesterday called attention to page 63 where the words occur. "Along the whole extent of the Pacific Ocean comprehending the sea within Behring Straits". It is put both in French and English.

Mr. Justice HARLAN.—The value of that depends on what he meant by the words "Pacific Ocean" in that first article.

Sir RICHARD WEBSTER.—He must have meant Behring Sea. He could not have meant anything else, for it is the right of free navigation along the whole extent of the Pacific Ocean comprehending the sea within Behring Straits.

Mr. Justice HARLAN.—Need he have referred to it if, as both sides admit, Russia had no purpose to exclude either the United States or Great Britain from the open waters of Behring Sea.

Sir RICHARD WEBSTER.—He must have referred to it for in any contention the 100 miles from Asia and from Alaska and from Siberia would have overlapped long below.

Mr. Justice HARLAN.—He specifically refers to Behring Straits for that reason.

Sir RICHARD WEBSTER.—Everybody agrees that the 100 miles would have excluded from the coast on the east side—and the coast on the west side—ships coming within 200 miles of Behring Straits and therefore from the point of view of this letter he is speaking of the navigation of something which will take him up to Behring Straits. What does he call that—the Pacific Ocean? If it can be suggested against me,—if you could suggest that the 200 miles from Behring Straits would have reached down south of the Aleutian Islands, there might be something in the suggestion but the fact that the person who penned this document is speaking of the Pacific Ocean as taking him up to Behring Straits shows conclusively in his mind he was arguing about the space of water which abutted so to speak upon Behring Straits, the 100 miles having disappeared altogether. May I trouble you kindly to refer to it. They actually speak in the same Article of two marine leagues thus at p. 63, App. II, B. C. we read.

> It being well understood that the said right of fishery shall not be exercised by the subjects of either of the two Powers nearer than two marine leagues from the respective possessions of the other.

And, therefore, it contemplated going quite close up to the shore of Behring Straits within two marine leagues. Again I may be met with this: That is what Great Britain said; is it what Russia said and I will ask Mr. Justice Harlan to look at page 69. I will translate (and the President will correct me) the opening words of Article III at page 69 of the counterdraft of the Russian Plenipotentiaries, "that in the possessions of the two Powers which are designated or described in the preceding Articles, and particularly so far as 59° 30′ of North latitude, but not further, the respective vessels shall have the right of visiting for ten years." Therefore Russia was asking not that Northwest Coast should have a different meaning, but that there should be a special limitation of the right of visit by Great Britain not above 59° 30′ for the ten years. They sought to limit the ten year period of visit to this

very coast that my learned friend Mr. Carter has been speaking of, not on the ground that it was called Northwest Coast. Nothing of the kind. They knew perfectly well that Northwest Coast meant a great deal more than that. They sought to put in terms of prohibition against visit beyond that point.

The PRESIDENT.—That excluded, of course, visiting Kadiak and Unalaska.

Sir RICHARD WEBSTER.—It excluded everything.

The PRESIDENT.—I thought it was more south.

Sir RICHARD WEBSTER.—Yes, I think it is a little more south.

The PRESIDENT.—Yet you consider that part as excluded?

Sir RICHARD WEBSTER.—Unquestionably from the point of view they were bargaining Russia tried to limit it to that latitude, and they had a reason for it, because between Great Britain and Russia there was a discussion about the *lisière* which only came into existence from the point of view of the British Treaty. It has no relation to the United States Treaty at all.

Now let me read Article V (see p. 69, App. II, B. C.):

> The High Contracting Powers stipulate moreover that their respective subjects shall freely navigate on the whole extent of the Pacific Ocean as much to the north as to the south without any hindrance, and that they shall enjoy the right of fishing on the high sea, but that this right shall not be exercised within a distance of two marine leagues from the coasts or possessions, be they Russian or be they British.

Now again I ask, what ground is there for suggesting that the coasts and possessions of Russia are to be limited to 60° or that the Pacific Ocean does not go right up to Behring Straits? What argument can be adduced in support of such contention except the assertion of Counsel, which is not argument at all for this purpose.

Senator MORGAN.—Is that Treaty now in force?

Sir RICHARD WEBSTER.—This is not the Treaty: It is the Russian *projet*. I am endeavoring to show that Russia understood Northwest Coast and Pacific Ocean through the whole of this in exactly the same sense that Great Britain understood it. Article VI is, the Russian Emperor wishing to give more proof of his regard for the interests of the subjects of His Britannic Majesty, and to give all success to useful enterprises which result from the discovery of the Northwest Passage of the Continent of America, consents that this freedom of navigation, mentioned in the preceding article, extends under the same conditions *au détroit de Behring*, and the sea situate to the north of it. Now, I ask Mr. Justice Harlan's kind consideration to this. The 100 miles has disappeared in this document. There is not a trace of the 100 miles, and they themselves proposed two marine leagues, and they speak of the right of navigation and of fishing, which is to extend within two marine leagues of the coast, as going right up to Behring Straits; and yet in the face of this the successors in title of Russia allege a right to say that the navigation at this time was understood by Great Britain as meaning to be confined to that which was south of the Aleutian Islands, and not to extend to these thousands of miles of water which extended from the Aleutian Islands up to Behring Straits.

Then Article VII provides that the Russian vessels and the British vessels navigating in the Pacific Ocean and the sea above indicated, that is the Arctic Ocean, as well when they are driven by tempests or by damage had taken refuge in the respective ports of the High Contracting Parties. In the Northern Ocean and Pacific Ocean they might get around to British possessions, and therefore up to the latest date Russia (and this points my observation) is seeking to get Great

Britain to agree to the ten years clause being limited to the *lisière* with regard to all the Articles—the Pacific Ocean and the Northwestern Coast—in the meaning which would include the coast up to Behring Sea.

Now Mr. Justice Harlan put a question, was the Treaty communicated to Great Britain before the other Treaty was signed will you be good enough to turn to page 72 of the same book (App. II B. C.) where will be found Mr. George Canning's communication with regard to the American Treaty, and that brings out in the clearest possible relief the arguments which I have been endeavouring to put before the Tribunal.

Article IV of the United States Treaty is thus summarized—I had better read the summary of both III and IV.

The third Article fixes the boundary line at 54° north of which the United States are not to form establishments and south of which Russia cannot advance.

There is no reference to 60° or any northern boundary or any southern boundary.

The fourth Article allows free entrance to both parties for ten years into all the gulfs, harbours etc. of each for the purposes of fishing and trading with the natives.

The contention of my learned friends now is that Great Britain only thought that under the words "North-west coast" in the Article of the British Treaty they were getting the right to fish up to latitude 60°. Now what does Mr. Canning say? It was present to his mind—because as I have shown to you but a few moments ago, Russia had been trying to get those things agreed to by Great Britain. He writes to Count Lieven who was the Russian Minister I believe in Engiand.

I cannot refrain from sending to your Excellency the inclosed extract from an American newspaper, by which you will see that I did not exaggerate what I stated to you, as the American construction of the convention signed at St. Petersburgh.

It is to this construction that I referred, when I claimed for England (as justly quoted by Count Nesselrode) whatever was granted to other nations. No limitations here of 59°.

There never had been any attempt to get Great Britain to limit the right of navigation or fishing except to the two leagues which is mentioned before. But with regard to this point of the north-west coast there had been the distinct attempt to get her to limit her 10 years clause to the very strip which Mr. Carter now suggests she agreed to limit it to.

Mr. Justice HARLAN.—What you read is a newspaper account of the Treaty. What you want I think is the letter of Mr. Addington on page 29.

Sir RICHARD WEBSTER.—For my particular purpose I do not want anything more than that summary. It is a true summary. It makes no difference for my purpose.

Mr. Justice HARLAN.—I thought you were reading it to show the British knew of the Treaty.

Sir RICHARD WEBSTER.—Well so I think they had as a matter of fact.

Mr. Justice HARLAN.—No they did not get it till the letter of Mr. Addington which shows he transmitted it I think to Mr. Canning.

Sir RICHARD WEBSTER.—You are right. I was perhaps endeavouring to take it a little more shortly than I need; but my argument is as strong whether it is a communication through a newspaper or any other channel. My point is that Great Britain knew the terms of the Treaty, and the moment the terms of the Treaty between the United States and Russia were called to Mr. Canning's attention, Mr. Canning said, "No

itation here of 59°," and demanded for Great Britain that which ssia had given to the United States; and yet, Sir, in the face of this 1 are solemnly asked to-day by written and oral argument to say it Great Britain acquiesced in the claim by Russia that the Pacific ean was to be excluded, and the north-west coast was to be confined ween latitude 60° and latitude 54°.

Sir I cannot allow myself to occupy your time by reading that which ly brings this out over again, but there is one sentence at the bottom page 73:

'or reasons of the same nature—

(This is in Mr. George Canning's letter to Mr. Stratford Canning).

cannot consent that the liberty of navigation through Behring Straits should be ted in the treaty as a boon from Russia.

And the last sentence is—

No specification of this sort is found in the Convention with the United States of erica, and yet it cannot be doubted that the Americans consider themselves as ured in the right of navigating Behring Straits and the Sea beyond them.

Is that consistant with Behring Sea being excluded from the operaons of the Treaty of 1824?

Lastly, the actual language of the Treaty was sent to Mr. Canning Mr. Addington's letter of the 29th of January, which is to be found page 75, wherein it is said to be—

'or defining the extent of the rights of either nation to the navigation of the rthern Pacific, and their traffic and intercourse with the north-western coast of erica.

But, perhaps, I ought to have read one other paragraph first, on ge 74.

erhaps the simplest course after all will be to substitute, for all that part of the rojet" and "counter-projet" which relates to maritime rights and to navigation, first two Articles of the Convention already concluded by the Court of St. Petersgh with the United States of America, in the order in which they stand in that ivention.

Then:

he uniformity of stipulations *in pari materiâ* gives clearness and force to both angements, and will establish that footing of equality between the several Conting Parties which it is most desirable should exist between three Powers whose rests come so nearly in contact with each other in a part of the globe in which other Power is concerned.

And then, on page 81, is the letter of Mr. Stratford Canning to Mr. orge Canning from St. Petersburgh; and here, Sir, is the answer to suggestion that we inherited this construction in 1824, which never the light until Mr. Blaine, or some of his advisers, evolved it in year 1890.

eferring to the American Treaty I am assured, as well by Count Nesselrode as by Middleton, that the ratification of that instrument was not accompanied with explanations calculated to modify or affect in any way the force and meaning is Articles. But I understand that, at the close of the negotiation of that Treaty, rotocol, intended by the Russians to fix more specifically the limitations of the it of trading

at was perfectly true, because it referred to the 10 years' clause)

h their possessions, and understood by the American envoy as having no such ct, was drawn up and signed by both parties. No reference whatever was made his paper by the Russian Plenipotentiaries in the course of my negotiation with m; and you are aware, Sir, that the Articles of the Convention which I concluded end for their force entirely on the general acceptation of the terms in which they expressed.

Will you kindly turn now to the British Treaty on page 53 of the British Case, and I will endeavor to take it as shortly as possible. It will not be waste of time to run through it without reading the articles at length. The scheme of that Treaty is of some little importance in order to complete my argument upon the point. Article I corresponds with, and I say is the same as, Article II in the United States Treaty. Articles III and IV find no place in the United States Treaty. They relate to the *lisière*. It is not necessary that I should do more than explain in one sentence what it was, that my story may be complete. It was necessary to determine a land boundary between British America and Alaska, and accordingly Articles III and IV relate solely to what that land boundary should be. Article V corresponds with Article III of the United States Treaty. It is an agreement between Great Britain and Russia as the previous agreement existed between the United States and Russia, that no establishment should be formed by Great Britain north of the line of delimitation. Then Article VI refers to the rivers crossing the *lisière*. It was necessary because it finds no place in the United States Treaty, because there was no *lisière*.

It is understood that the subjects of His Britannic Majesty, from whatever quarter they may arrive, whether from the ocean or from the continent shall for ever enjoy the right of navigating freely, and without any hindrance whatever, all the rivers and streams which, in their course towards the Pacific Ocean, may cross the line of demarcation upon the line of coast described in Article III of the present Convention.

Perhaps, it would not be inconvenient if I read to you the French version of that Treaty, which you will find—and you can put them side by side—at the end of the B. C. Appendix, Volume 2, Part III to which I have just been referring.

The PRESIDENT.—It would be better to look at the French original, as this was a translation. What you have just read is the English translation.

Sir RICHARD WEBSTER.—You are right, Sir. In both cases the originals of this Treaty were in French. What General Foster said later on about the 1867 Treaty did not apply to the one of 1824.

If you would look if you please, Sir, at Article VI, on page 3, of part 2, you will find this.

Mr. Justice HARLAN.—It is in the Appendix to the American Case, volume I, pages 39 and 40.

Sir RICHARD WEBSTER.—Quite true. It is this:

Il est entendu que les sujets de Sa Majesté Britannique, de quelque côté qu'ils arrivent, soit de l'Océan soit de l'intérieur du continent, jouiront à perpétuité du droit de naviguer librement et sans entrave quelconque, sur tous les fleuves et rivières qui, dans leurs cours vers la mer Pacifique, traverseront la ligne de démarcation sur la lisière de la côte indiquée dans l'Article III de la présente Convention.

Therefore, when you look at the original, there is not any doubt about it at all, because they refer, most properly, to the "lisière de la côte"; and if you will turn back to Article III you will find there the lisière described.

Mr. Justice HARLAN.—What are the English words in Article VI corresponding to lisière?

Sir RICHARD WEBSTER.—I will read it:

May cross the line of demarcation upon the line of coast.

The expression "line of coast" is not the proper translation—it ought to be "*strip* of coast". "Strip" is the correct translation of "lisière", if I may be permitted to say so Mr. President, and no doubt if I am wrong you will correct me. "Lisière" is "selvage"—"strip"—like the edge of cloth—"border".

Lord HANNEN.—You might suggest yet another word—"margin".

Sir RICHARD WEBSTER.—I will read now Article VII, which corresponds with the American Article IV.

It is also understood that, for the space of ten years from the signature of the present Convention, the vessels of the two Powers, or those belonging to their respective subjects, shall mutually be at liberty to frequent, without any hindrance whatever, all the inland seas, the gulfs, havens, and creeks on the coast mentioned in Article III, for the purposes of fishing and of trading with the natives.

Not the *lisière;* and if you look at the French, which is perfectly plain description, the words are:

Les golfes, havres et criques sur la côte mentionnée dans l'Article III——

Without any reference to "lisière" at all. The only feeling I have in dealing with this matter, is that it is a little cruel to my friends to be exposing the impossibility of maintaining the argument by which Mr. Carter has said, in his opinion, Mr. Blaine, to his entire satisfaction was completely successful in showing that Behring Sea was excluded from the Pacific Ocean, and that Northwest coast had this meaning by those treaties.

Mr. Justice HARLAN.—Would you turn to Article III and tell me what is the "coast" mentioned there.

Sir RICHARD WEBSTER.—Yes. The coast mentioned in Article III, is—

The line of demarcation between the possessions of the High Contracting Parties upon the coast of the continent and the islands of America to the north-west.

That is from about 54° 40′ right up to the point where 141° West longitude strikes the Arctic Ocean, and I submit there is no question about it.

The line of demarcation runs behind the lisière until it gets to Mount St. Elias, and then it goes straight up.

Mr. Justice HARLAN.—What do you say is the point of the shore referred to as the "coast" in Article VII?

Sir RICHARD WEBSTER.—The "coast" is the whole of the coast up to Behring Straits.

Mr. Justice HARLAN.—Up to Behring Straits?

Sir RICHARD WEBSTER.—The line of demarcation is a complete line. It divides the British possessions from the Russian possessions; it has nothing to do with the lisière.

Now I will read the translation, and perhaps, Mr. President, you will kindly follow it in French. I am reading from page 54 of the British Case. It is not my translation but I believe it is correct. It is this:

The line of demarcation between the possessions of the High Contracting Parties upon the coast of the continent and the islands of America to the north-west, shall be drawn in the manner following:

Commencing from the southernmost part of the island called Prince of Wales' Island, which point lies in the parallel of 54° 40′ north latitude, and between the 131st and the 133rd degree of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from this last-mentioned point, the line of demarcation shall follow the summit of the mountains situated parallel to the coast, as far as the point of intersection of the 141st degree of west longitude "of the same meridian"; and, finally, from the said point of intersection, the said meridian-line of the 141st degree, in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British possessions on the continent of America to the north-west.

I submit (remembering that the line of demarcation was to be complete with reference to the coast referred to as the north-west coast of

the continent, and the Islands of America to the north west), that nobody who can take an impartial view of this matter can come to any other conclusion than that the coast referred to in Article VII is the whole coast; and when we remember that in the United States the expression *lisiere* does not occur at all, and that Article III of the United States treaty speaks of the north-west coast of America north of 54° 40′, and that I am justified in saying that Mr. George Canning believed that he was getting the same for Great Britain as the United States had got from Russia—there is not any answer, at any rate, apparent (unless I have made some grave blunder) to the contention that the right of Great Britain to visit, during ten years, inland creeks, and harbours, and to visit for the purpose of navigation and fishing the seas which washed the American coasts extended right away from 54° 40′ up to the point to which I have called attention.

Now it is not necessary for me, unless my friends tell me so, to refer to the other Articles of the Treaty. They relate to the sale of spirits, and to Sitka, and New Archangel, and to other matters, which are specially referred to, but have no bearing on the discussion which is now before you.

There are two matters in this connection which have not received notice, and to which I ought to direct the attention of the Tribunal, not in any way as qualifying or even as strengthening what in my submission to this Court is so absolutely plain, but I refer to it in order that it may not be thought that I have overlooked my friend, Mr. Carter's, point. Mr. Carter said, for the purposes of this Treaty, they were not concerned with what the previous correspondence had been. They said "the Ocean commonly called the Pacific Ocean"—I think I have quoted the language quite correctly—and accordingly they meant by that "south of the Aleutian Islands". It would have been a little satisfactory, at any rate to us who have to answer my friend, if he had gone on and told us where he got the common reputation of Pacific Ocean to be that south of the Aleutian Islands; but, at any rate, I will put the material before the Court. I must not read it, because it would be simply a waste of time, in one sense—not a waste of time as far as the information is concerned, but it would be trespassing on the indulgence of the Court to read it. There are several collections of what I may call information of considerable use, if this matter came to be discussed. I call attention first to the 1st volume of the Appendix to the Counter Case, because it happens to be most complete, and will ask you to look at page 88. Now there you will find, Mr. President, that which we believe to be the most complete record (and they have been selected without any regard to taking anything that is for or against us) of the maps and geographies which have ever been collected in connexion with this matter. The list sent by Mr. Blaine to Lord Salisbury was found, when it came to be examined very deficient indeed. This is very much larger, and it includes a great many more; and Mr. Blaine's list did not call attention to the way in which the names were used.

Would the Tribunal kindly look at page 88 of App. I to British Counter Case. In the margin there you will find the date put of every reference made. I will read down the dates first. 1795; 1802; 1803; 1804; 1808; 1815; 1819; 1822; 1823; 1826; showing that they are pretty contemporaneous. Now, Mr. President, let me read you a specimen of two or three of them:

"Kamschatka Sea is a large branch of the Oriental or North Pacific Ocean."

"Behring's Straits, which is the passage from the North Pacific Ocean to the *Arctic Sea*."

"Beering's Island. An island in the Pacific Ocean."
"Kamschatka. Bounded east and south by Pacific."

That is a most important matter:

Bounded east and south by Pacific.

Then it says:

Kamschatka. Bounded on the North by the country of the Koriacs, on the east and south by the North Pacific Ocean and on the west by the Sea of Okotsk.
Behring's Island. In the North Pacific Ocean.
Behring's Island. An island in the North Pacific Ocean.
Kamschatka. River, which runs into the North Pacific Ocean.

The Kamschatka River runs into Behring Sea North of the Commander Islands. Then there is the date of 1819. I have not read the dates against each. I might have done it perhaps in that way. Then it goes on:

"Pacific Ocean considered as the boundary of the Russian Empire, washes the shores of the Government of Irkutsk, from Tschukotsky Noss, or Cook's Straits, to the frontiers of China; or, in other words, from the mouth of the River Aimakan that is, from 65° to 45° North latitude. It is divided into two great parts. That lying eastwards from Kamschatka, between Siberia and America, is eminently styled the Eastern, or Pacific Ocean; that on the west side, from Kamschatka, between Siberia, the Chinese, Mongolia, and the Kurile Islands, is called the Sea of Okhotsk. From the different places it touches it assumes different names, e. g., from the place where the River Anadyr falls into it, it is called the Sea of Anadyr, and above Kamschatka the Sea of Kamschatka; and the bay between the districts of Okhotsk and Kamschatka, is called the Sea of Okhotsk, the upper part of which is termed Penjinskoye More, that is, the Penjinskian Sea, as it approaches the mouth of the River Penjine."

I might occupy a great deal more time than the importance of the question merits, in going through these documents. If you will turn to pages 92 to 105 you will find a consecutive record of maps, without selection, from which it will appear that though at times portions of the North Pacific were called, and properly called, Beaver Sea, Behring Sea, Sea of Kamchatka, and some other names, that in the vast majority of cases the common appellation given to the whole district of the ocean right up to the Behring Straits is Pacific Ocean.

Mr. Justice HARLAN.—Sir Richard, do you regard the phrases "North Pacific Ocean" and "Pacific Ocean", as identical all through that volume?

Sir RICHARD WEBSTER.—I think, Sir, that "North Pacific Ocean" is for this purpose identical with "Pacific Ocean": "South Sea" was another name for it for a particular reason. South Pacific Ocean would really begin south of the equator. I have not studied the actual point where South Pacific would end, but I understand that North Pacific Ocean merely means the northern part of the Pacific Ocean.

Mr. Justice HARLAN.—I have seen a good many maps on which the waters south of the Aleutian Islands are marked distinctly "North Pacific Ocean", while the waters north of them were marked sometimes Sea of Kamtchatka, and sometimes Behring Sea. It is quite true, as you say, that there are maps both ways.

Sir RICHARD WEBSTER.—There is a large number of maps on which Pacific Ocean appears as going over the whole, and Behring Sea appears, above it, in small type as being the sea which was what I may call the part of the Pacific Ocean that had got that name.

You will find a map of the North Pacific Ocean below the Aleutian Islands hanging behind you, and Behring Sea put in its place. At any rate, it should not be thought that we have created evidence for ourselves. It is known all over the world that particular seas and parts of

the ocean get local names; but for this purpose we have got to consider what the parties meant when they wrote it in that treaty. I trust I have not failed in bringing to the mind of the court the demonstration that they did mean the part of the Ocean right up to Behring Straits.

Lord HANNEN.—To what extent do you say this list is exhaustive?

Sir RICHARD WEBSTER.—As far as the maps are concerned, my Lord, I believe it contains every known map that could be found.

Mr. Justice HARLAN.—Oh, no; there are a great many of the maps not given. Mr. Blaine, in his correspondence with Lord Salisbury, gives 105 maps.

Sir RICHARD WEBSTER.—There are 136 in this list, Sir; but not all of Mr. Blaine's are included because later Editions were inserted.

Mr. Justice HARLAN.—More than half of Mr. Blaine's I think, are not mentioned in your list.

Sir RICHARD WEBSTER.—I do not think that is correct, Judge.

Mr. Justice HARLAN.—I may be wrong.

Sir RICHARD WEBSTER.—I do not think that is correct; but I really have not examined it personally.

Lord HANNEN.—I wanted to know because I find—if you are right, you know—that down to the year 1825, according to your statement, the Behring Sea is never mentioned. You stated that this is exhaustive. Behring Sea is not mentioned in any of these geographies.

Sir RICHARD WEBSTER.—It would perhaps be convenient to say a word or two about the maps themselves.

Lord HANNEN.—These are all the geographies?

Sir RICHARD WEBSTER.—I believe, my Lord, that the list of geographies has been made as chronologically accurate as it could be. I do not pretend to say we found every book that exists, because it is not possible; but at any rate it was endeavored to be done impartially; and so far as we could, they were taken from the books which could be found.

Lord HANNEN.—Take the third: "Behring Island, an island in the Pacific Ocean". Then there is added "Behring Island in the Behring Sea".

Sir RICHARD WEBSTER.—That is the first name given to it.

Lord HANNEN.—That is added?

Sir RICHARD WEBSTER.—That is our commentary, put in brackets. It is the first time Behring Island was mentioned, and we desired to show where it was.

Mr. Justice HARLAN.—Behring Island is to the left of the Copper Island.

Sir RICHARD WEBSTER.—Mr. President, I had not intended to trouble you with the maps; but I should like to pick out a few as I pass, in order to shew you the importance of them. Of course in these early days people naturally borrowed from one another. There was not so much known about the maps, and you would not expect it. If you will kindly look, Sir, at the earliest on page 92.

A general chart, exhibiting the discoveries made by Captain James Cook, etc. This is the original of the chart in the 8vo edition. Behring Sea appears without names, though Olutarskoi sea, Beaver Sea, Gulf of Anidir, Shoal Water, Bristol Bay, appear as local names of equal rank. The three first close in to the Asiatic coast. Behring Strait, North Pacific Ocean.

Then at number 4.

Chart of the N. W. Coast of America and the N. E. Coast of Asia. Explored in the years 1778 and 1779. Prepared by Lieut. Roberts under the immediate inspection of Captain Cook. Published by W. Faden, Charing Cross, July 24, 1784. *Behring Sea* named *Sea of Kamchatka.*

Beaver Sea close in to shore of *Kamchatka.*
Sea of Okotsk, equivalent in rank to *Sea of Kamchatka.*
Gulf of Anadyr, Bristol Bay.
Northern Part of Pacific or *Great South Sea.*
The Aleutian Islands are very imperfectly shown.

It is most important, when you refer to those maps, to see whether they wrote the names large or small, in order to see the importance they attach to them.

Then you will find page 94, 1794, No. 15, an important map

Prepared by Lieut. Henry Roberts under the immediate inspection of Captain Cook, London. Published by William Fadden, Geographer to the King.

Mr. Justice HARLAN.—Before you get to that, there is a similar reference, on page 93.

Sir RICHARD WEBSTER.—Will you kindly give me the date?

Mr. Justice HARLAN.—It is number 4, on page 93 the year being 1784. There *Behring Sea* is named *Sea of Kamchatka*, and then there are other seas there. Then there is the *Northern part of the Pacific* or *Great South Sea.* Have you got that chart itself, so we can see how they are divided?

Sir RICHARD WEBSTER.—I do not know whether we have but I may be able to obtain it for you.

Mr. Justice HARLAN.—I desired to ask in that connection how many more of those maps, by name and in words, speak of the Pacific as the *South Sea* or *Great South Sea.*

Sir RICHARD WEBSTER.—I have not worked it out. I know the name *Great South Sea* disappeared very soon; but about what date I could not tell you. I will try and have it worked out, Judge, if I can.

Mr. Justice HARLAN.—I do not know that it is important. We can do that.

Sir RICHARD WEBSTER.—Yes. If you will look at 1794, which is a very important map, you will see that it is one which undoubtedly made what I may call a record at the time. It is number 15. The advertisement was:

The interesting discoveries made by British and American ships since the first publication of the Chart in 1784, together with the hydrographical materials lately procured from St. Petersburgh and other places, have enabled Mr. de la Rochette to lay down the numerous improvements which appear in the present edition.

Mr. Justice HARLAN.—That is the second edition of the map to which I have just called attention.

Sir RICHARD WEBSTER.—You are quite right:

The main body of Behring Sea, which in the first edition was styled *Sea of Kamchatka*, here appears without any distinctive name.
Sea of Kamchatka is written on the waters immediately adjacent to the peninsula.
Sea of Anadyr replaces the *Gulf of Anadyr* of the 1st edition.
Sea of Okotsk appears as a name of equal right with *Sea of Kamchatka* and *Sea of Anadyr.*
Beaver Sea is written in smaller characters along the Kamchatkan coast to the north of Petropaulovski.
Behring Strait, Bristol Bay.
North Part of the Pacific Ocean or *Great South Sea.*

At that time it appears that the name Great South Sea still continued to be used.

Then I have marked a good many; but I think I might perhaps indicate the numbers without reading them, of those that are clearly important. There are numbers 17 and 18, two of the French maps in which Behring Sea is not named, but the whole of the North Pacific is called *Grand Ocean Septentrional*, and *Grand Ocean.* Then there are 24 and 25.

Mr. Justice HARLAN.—It was named the Sea of Kamchatka in 1817.

Sir RICHARD WEBSTER.—No, Sir; not in number 17.

Mr. Justice HARLAN.—On page 99. I thought you meant the year 1817.

Sir RICHARD WEBSTER.—No; I was giving the number of the map. No. 17 on page 95, in the year 1798. They are numbered consecutively; and number 18 is in the same year. Then I should call attention to 24, 25, 26, and 32.

Mr. Justice HARLAN.—I see that in number 24 Behring Sea is known as *Beaver Sea* and the North Pacific is named *Southern Ocean* or *Still Sea.*

Sir RICHARD WEBSTER.—I do not know whether you have noticed it; but *Beaver Sea* which is written across in some maps is in the more correct maps written as a small local name close to the coast of Kamchatka. It is mentioned in more than one place in these maps, and written in smaller characters along the Kamchatkan Coast to the north of Petropaulovski.

Then there is number 40, which is an important map, on page 96:

Arrowsmith's Chart of the Pacific Ocean. This is a large and important Map in nine sheets, specially devoted to the Pacific Ocean. Originally published in 1798. This edition with corrections to 1810. The northern edge of the Map runs about latitude 62 degrees north, and it includes the greater part of Behring Sea but shows it as a large blank unnamed space. *Bristol Bay* alone is rather prominently named. By contrast, the *Sea of Okhotsk: Sea of Japan*, and other enclosed seas are named.

If you will kindly look, Mr. President, at the map of the Pacific, it takes you up to 62 degrees. It would be a little south of the Yukon River, and therefore includes a great deal more than nine-tenths of Behring Sea as now understood. That is to say, it is some 500 miles north of the Pribilofs, and would practically be, for all substantial purposes, the whole of Behring Sea, except the part immediately running into the neck of Behring Straits; and that was a chart of the Pacific Ocean as early as the year 1810.

Mr. Justice HARLAN.—The map published by that same man according to Mr. Blaine's list, in 1811, in London, gives the Sea of Kamchatka.

Sir RICHARD WEBSTER.—I think, Sir, that is number 46 in our list.

Mr. Justice HARLAN.—Yes; that is the same one.

Sir RICHARD WEBSTER.—(Quoting):

Hydrographical Chart of the world. A. Arrowsmith, 1811.
Behring Sea named Sea of Kamchatka.
Behring's Straits. North Pacific Ocean.

We would have to look at that map to see how the words "Sea of Kamchatka" were used; but I do not think it in any way strengthens the contention of my learned friends to suggest that what I may call varying names are sufficient to differentiate this from a part of the Pacific Ocean.

Lord HANNEN.—What is that intended to indicate, Sir Richard, "*Bering's Strait, North Pacific Ocean*"? They are written in italics. Does it merely mean that Behring Strait is put in, or does it indicate at all how far out the North Pacific Ocean extends?

Sir RICHARD WEBSTER.—I do not think it indicates anything more than that Behring Strait is put in. The names that appear are *Sea of Kamchatka* and *Behring Strait.*

Mr. Justice HARLAN.—It does not show their relation to each other. Right along in those years the Sea of Kamchatka seemed to be all one name with Behring Sea.

Lord HANNEN.—Have you got any one of the maps which would lustrate what is meant by this collocation of Behring Straits and orth Pacific Ocean?

Sir RICHARD WEBSTER.—I will find out, my Lord. I cannot answer off-hand, because the work of examining them is so heavy that I nnot say for certain whether any of those are actually accessible.

Then, Mr. President, a great deal of information is given on page 105 to the meaning of the words "Northwest Coast"; and again there not any evidence to be found of Northwest Coast being used in this nited sense in any of the existing books. It simply is a question of stance after instance of either Northwest Coast being specially defined r the purposes of the book, indicating a particular part, or Northwest oast being used as including the whole. Nowhere is there any evince of Northwest Coast being recognized as being the piece between titude 60° and latitude 54° 40′. I will now give you a reference to e pages. You will find that fully examined on pages 105 to 108 of at Appendix; but I can put that a little more briefly before the Trinal, if they will kindly refer to page 66 of the British Case. This a book published in 1840 by Mr. Greenhow, whom you will find is lmitted by the United States people, at that time, at any rate, to be great authority. At page 66 is set out the extract from his work of ie year 1840:

The *Northwest Coast*—

And these italics are Greenhow's own.

the expression usually employed in the United States at the present time to disnguish the vast portion of the American continent which extends north of the 40th arallel of latitude from the Pacific to the great dividing ridge of the *Rocky Mountains* together with the contiguous islands in that ocean. The southern part of this arritory, which is drained almost entirely by the River Columbia, is commonly alled *Oregon*.—

I believe the Columbia River comes in—I see it marked there a little ray down the red color, Mr. President.—

From the supposition (no doubt erroneous) that such was the name applied to its rincipal stream by the aborigines. To the more northern parts of the continent nany appellations which will hereafter be mentioned, have been assigned by navitors and fur traders of various nations. The territory bordering upon the Pacific outhward, from the 40th parallel to the extremity of the Peninsula which stretches n that direction as far as the Tropic of Cancer, is called *California*, a name of ncertain derivation, formerly applied by the Spaniards to the whole western section of North America, as that of *Florida* was employed by them to designate the egions bordering upon the Atlantic. The Northwest Coast and the West coast of 'alifornia, together form the *west coast of North America;* as it has been found npossible to separate the history of these two portions, so it will be necessary to iclude them both in this geographical view.

Mr. Greenhow here gives the following note:

In the following pages the term "coast" will be used sometimes as signifying only e seashore, and sometimes as embracing the whole territory, extending therefrom the sources of the river; care has been, however, taken to prevent misapprehens, where the context does not sufficiently indicate the true sense. In order to oid repetitions, the *northwest-coast* will be understood to be the *north-west coast of rth America;* all latitudes will be taken as north latitudes, and all longitudes as et from Greenwich, unless otherwise expressed.

The Memoir continues as follows:

The northern extremity of the west coast of America is *Cape Prince of Wales*, in titude of 65 degrees 52 minutes, which is also the westernmost spot in the whole ntinent; it is situated on the eastern side of Behring's Strait, a channel 51 miles width, connecting the Pacific with the *Arctic* (or *Icy* or *North Frozen*) *Ocean*, on e western side of which strait, opposite *Cape Prince of Wales*, is *East Cape*, the

eastern extremity of Asia. Beyond *Behring Strait* the shores of the two continents recede from each other. The north coast of America has been traced from *Cape Prince of Wales* north eastward to *Cape Barrow.*

The relations of Behring Sea to the Pacific Ocean are defined as follows in the "Memoir":

The part of the Pacific north of the Aleutain Islands which bathes those shores is commonly distinguished as the *Sea of Kamchatka*, and sometimes as *Behring Sea*, in honour of the Russian navigator of that name who first explored it.

Then he refers to Cape Prince of Wales as follows:

Cape Prince of Wales, the westernmost point of America, is the eastern pillar of Behring Strait, a passage only 50 miles in width, separating that continent from Asia, and forming the only direct communication between the Pacific and Arctic Oceans.
The part of the Pacific called the *Sea of Kamchatka*, or Behring Sea, north of the Aleutian chain, likewise contains several islands.

In the year 1845 the Government of the United States sent Mr. Greenhow's book "The History of Oregon and California and the other territories of the Northwest Coast of America" to the Government of Great Britain as being in some sense an official document, evidently desiring it to be regarded as containing very accurate information. We happen to have that original book here, the one which was sent at that time; and it is at the service of any one of my friends or any one of the Tribunal. It would simply be a matter of reading page after page and extract after extract in which you will find both the "Pacific Ocean" and the "Northwest Coast" are used by Mr. Greenhow in his works as referring to the part of America extending right away from about latitude 51°—perhaps a little lower than that; 50° would be perhaps more correct—right away up into the Arctic Ocean.

It does seem to me a little difficult for those who desire so to contend that this indicates or supports the views that the Pacific Ocean was commonly known as including Behring Sea.

You will remember, Sir, that Lord Salisbury in his dispatch of the 21st February 1891 points out that it has been the constant practice all over the world to call seas, bays and other parts of the ocean by local names, and yet they may all be covered by the generic name which covers the whole of it. There is a clear and important passage contained on page 89 of part 2 of volume 3; but I will not trespass upon your time by reading it at length. But Sir, it does appear to me a little strange that the United States should raise this contention.

The Tribunal here adjourned for a short time.

Sir RICHARD WEBSTER.—Mr. President, a question was put to me by Mr. Justice Harlan upon the maps, to which, perhaps, I ought to refer only for one moment, just to show the impossibility of relying upon matters of this kind without full examination. In page 265 of the first volume of the United States Appendix will be found an extract from Mr. Blaine's letter with reference to the maps, and I refer to one of them:

English statesmen of the period when the treaties were negotiated had no complete knowledge of all the geographical points involved. They knew that on the map published in 1784 to illustrate the voyages of the most eminent English navigator of the eighteenth century the Sea of Kamchatka appeared in absolute contradistinction to the Great South Sea or the Pacific Ocean. And the map, as shown by the words on its margin was prepared by Lieut. Henry Roberts under the immediate inspection of Captain Cook.

If you will refer to the list of maps to which I was calling attention before, namely, page 94 of the first volume of the Appendix to the

Counter Case you will see that map referred to. It is page 93, number 4:

Chart of the North West coast of America and the North East Coast of Asia explored in the years 1778 and 1779. Prepared by lieutenant Roberts under the immediate inspection of Captain Cook, published by W. Faden, Charing Cross, July 24th, 1784.

That is the map, Mr. Blaine refers to. Now, if you will be good enough to turn over to page 94 you will find Mr. Blaine has overlooked the fact that 10 years later the 2nd edition of that map was published also prepared by Mr. Roberts [No. 15] and also published by Faden in which distinctive use of the name has disappeared altogether. May I ask you to look at page 93, No. 4 where you find the words "Behring Sea named Sea of Kamchatka" and if you look 10 years later the next edition of that map 1794 to which no reference is made by Mr. Blaine.

The main body of Behring Sea, which in the first edition was styled Sea of Kamchatka, here appears without any distinctive name, Sea of Kamchatka is written on the waters immediately adjacent to the peninsula.

So that you will observe that the whole point of Mr. Blaine's argument disappears if you look at the second edition of that map published in 1794. He is referring to the edition of 1784.

This was called to my attention during the adjournment, and I mention this for the purpose of enforcing the fact. Unless you have the maps before you and see how the words are used, no inference can be drawn from them; whereas, in the statement in the "Gazetteer", you have the specific statement made on the authority of the Geographer, whoever it is, telling you exactly what is meant, though, of course, it depends on your knowledge of the man as to the amount of authority to be attached to the statement.

Now, when the Tribunal adjourned, I was about to call attention to other uses of the Northwest Coast which are consistent only with our view and inconsistent with that of the United States; and I desire, if I possibly can, to put it as shortly as possible, and I will a little vary the order of my observations.

I will ask the Tribunal to take before them pages 40 and 41 of the 1st Volume of the Appendix to the British Case, which will enable me to give them several references without turning from one volume to another.

I am now upon the period subsequent to the Treaties of 1824 and 1825. I am reading from the historical review of the formation of the Russian American Company by Tikhmenieff, published in St. Petersburgh in 1863. You will observe that the year 1842 is referred to; and you will observe there that reference is made to reports by Governor Etolin of the continuous appearance of American whalers in the neighbourhood of the Harbours and Coasts of the Colony; and you will find that a statement is made that in the year 1841 there had been whalers to the number of 50, and that large quantities of whales had been secured; and you will find that the Foreign Office, in reply to energetic representations made by the company, had replied:

The claim to a *mare clausum*, if we wished to advance such a claim in respect to the northern part of the Pacific Ocean, could not be theoretically justified. Under Article I of the Convention of 1824 between Russia and the United States, which is still in force American citizens have a right to fish in all parts of the Pacific Ocean. But under Article IV of the same Convention, the ten years' period mentioned in that Article having expired, we have power to forbid American vessels to visit island seas, gulfs, harbours, and bays for the purposes of fishing and trading with the natives. That is the limit of our rights, and we have no power to prevent American ships from taking whales in the open sea.

Then:

From 1843 to 1850 there were constant complaints by the Company of the increasing boldness of the whalers. They were not content with landing on the Aleutian and Kurile Islands, cutting wood wherever they chose, boiling blubber on the shore," *then 10 lines lower down* "Traffic in furs was openly carried on between the natives and the American Captains, and when the Colonial authorities made some whalers leave Novo Arkhangelsk (N P) on that account, they quietly continued the traffic in the Bay of Sitka, and disregarded all protests. The following case also deserves to be noticed; in 1847 one of the whalers came to Behring Island, and on the Captain being told that he must not traffic in seal-skins on a neighbouring small island, he ordered the overseer of the island to be turned off his ship, and immediately went on shore with his men, with the evident intention of disregarding the prohibition.

It was only when active steps were taken to resist them that the whalers left, but before going they cut down a plantation which had been grown with great trouble, the island being without other trees or shrubs. Few of the districts of the colony escaped the visits of the whalers, which were everywhere accompanied by acts of violence on their part.

Whenever complaints of such acts reached the Company, they took all the steps in their power to protect the country under their administration; but all their efforts led to no satisfactory result. In 1843, almost immediately after the first protest of the Company, the colonial authorities were alarmed at the large number of whalers engaged round the shores of Kadiak, as the Company's fur trade was certain to suffer from their presence.

And there was a request for a cruiser made to prevent the vessels from interfering and going into the territorial waters of Russia.

Then lower down, there is this.

In 1847 a representation from Governor Tebenkoff in regard to new aggressions on the part of the whalers gave rise to further correspondence. Some time before, in June 1846, the Governor-General of Eastern Siberia had expressed his opinion that, in order to limit the whaling operations of foreigners, it would be fair to forbid them to come within 40 Italian miles of our shores, the ports of Petropaulovsk and Okhotsk to be excluded, and a payment of 100 silver roubles to be demanded at these ports from every vessel for the right of whaling. He recommended that a ship of war should be employed as a cruiser to watch foreign vessels. The Foreign Office expressly stated as follows in reply. We have no right to exclude foreign ships from that part of the Great Ocean which separates the eastern shore of Siberia from the north-western shore of America or to make the payment of a sum of money a condition to allowing them to take whales.

I need not remind you, Mr. President, as my learned friend, the Attorney General, pointed out, that could only be and is only the Behring Sea, no other part of the Great Ocean corresponds with that.

Then, at the bottom of the page, going on to the year 1853, you will actually find the instructions to cruisers:

The cruisers were to see that no whalers entered the bays or gulfs, or came within 3 Italian miles of our shores, that is, the shores of Russian America (north of 54° 41′), the Peninsula of Kamchatka, Siberia, the Kadiak Archipelago, the Aleutian Islands, the Pribilof and Commander Islands, and the others in Behring Sea, the Kuriles, Sakhalin, the Shantar Islands, and the others in the Sea of Okhotsk to the north of 46° 30′ north. The cruisers were instructed constantly to keep in view that "our Government not only does not wish to prohibit or put obstacles in the way of whaling by foreigners in the northern part of the Pacific Ocean; but allows foreigners to take whales in the Sea of Okhotsk, which, as stated in these instructions, is, *from its geographical position, a Russian inland sea*".

Now in the face of that brief summary which I have been fortunately able to take from one document, referring to 1842, 1843, 1847 and 1853, it is obvious, and cannot I submit be denied by the Counsel for the United States, that there were at this time no acts supporting the contention that Russia never withdrew her prohibition with regard to navigation and fishing in Behring Sea, that Great Britain had recognized that the prohibition extended to Behring Sea. I will read it if you please, Mr. President, from pages 56 and 57 of the United States Case which still stands.

But neither in the protests negociations, nor treaties is any reference found to *Behring* Sea, and it must be conceded from a study of those instruments and the subsequent events that the question of jurisdictional rights over its waters was left

where it had stood before the treaties, except that the exercise of these rights by Russia had now, through these treaties, received the implied recognition of two great nations; for while, by the Ukase of 1821 Russia had publicly claimed certain unusual jurisdiction both over Behring Sea and over a portion of the Pacific Ocean, yet in the resulting treaties which constituted a complete settlement of all differences growing out of this Ukase, no reference is made to this jurisdiction so far as it related to Behring Sea although it is expressly and conspicuously renounced as to the Pacific Ocean.

Will you for a moment consider what that case means? I must assume that I have demonstrated to this Tribunal that the suggestion that there was no reference made to Behring Sea in the negotiations or the treaties is unfounded, but the fact that they have distinctly stated in their case that in regard to what they are pleased to call the Pacific Ocean there was an express withdrawal by Russia of her attempt to limit the rights of navigation and fishing, points and certainly accentuates the observations I have ventured to make as to what was going on, after 1824 and 1825, in this part of the sea referred to by them as being part of the Great Ocean which separates the Eastern Coast of Siberia from the north western part of America, from which they had no right to exclude navigation or fishing vessels of the United States and Great Britain.

If the Tribunal will be good enough to look at page 51 of the British Counter Case you will find certain contemporaneous uses of the word north-west, in the face of which I submit, it is impossible for my learned friends effectively to maintain their contention.

Let me remind the Tribunal of what their contention is.

That although the coast of which we are speaking is in fact the Northwest Coast, yet the term Northwest Coast had such a technical meaning that it is to be confined to the space between latitude 60° and latitude 54° 40′, or south of it—nothing north of latitude 60°.

At page 51 the Tribunal will see that by Treaty of 20th December 1841 (the reference to Hertslet is given and we have Hertslet here)—Great Britain, Austria, France, Prussia and Russia entered into a Treaty for the suppression of the Slave trade and in no case was the mutual right of search to be exercised upon the ships of war of the High Contracting Parties. It is sufficient for my purpose that one of the contracting parties was Russia. By section 8 of the annex to that treaty this exemption was extended to vessels of the Russian American Company, such vessels to have a patent and prove their place of origin and of destination.

Perhaps it would not be out of place if I reminded you here of a most extraordinary contention that appears in the argument of the United States for the first time—that the Russian American Company had no monopoly after 1824 and 1825 of the eastern shore of America. It is one of the instances in which the United States have thought it necessary to suggest that an important official document is wrongly worded, and have without justification, as we shall submit, altered the wording to support their meaning. But at present, to make my point clear, I call attention to the fact that the Russian American Company had at this time, as I shall show you, the monopoly from Behring Straits on one side down to latitude 54° 40′ on the other, and from Behring Straits on one side down to the Island of Urup on the Asiatic Coast—their vessels were to be exempted from search and each vessel was to have a patent; the form of this patent is set out at page 51 of the British Counter-Case:

Upon this ground the Administration of the Russian American Company, being about to dispatch their ship *blank* named *blank* built in the year *blank* of *blank* tonnage and commanded by *blank* to the north-western coast of America to the colonies settled there, with the right to enter all ports and harbours, which necessity may

require, considers it conformable to the above cited Article of the Instruction that besides the patent authorizing the hoisting of the Russian flag by merchant ships in general, the said vessel of the Company should be provided with this special patent to secure her against the visit of the cruizers of the contracting parties.

Mr. President, is it reasonable to suggest that in the patent given to these vessels, Northwest Coast there meant between 60° and 54° 40′? Is it not perfectly obvious that they were referring there to the whole length of the Northwest Coast of America from 54° 40′, as far as the Russian dominions extended, and I call your attention, and you will see the reference upon the same page, to this, that in the year 1843, that Treaty having been made in the year 1841, the Treaty of 1825 was renewed in these words:

It is understood that in regard to commerce and navigation in the Russian possessions on the Northwest Coast of America, the convention concluded at St. Petersburgh on the 16th February, 1825, continues in force.

Would anybody suggest that only means the portion of the Northwest Coast to which my learned friend, Mr. Carter, asks you to attribute the limited meaning to which I have referred.

Senator MORGAN.—My suggestion, Sir Richard, was in reference to the question whether it included the hunting of animals that were fur-bearing.

Sir RICHARD WEBSTER.—I quite follow you, Sir. As I have said more than once, I never relied upon these Treaties as a grant at all. I have always relied upon them as an undertaking by Russia not to interfere, but it does not touch the point you referred to when you suggested what must be found in the Treaties. Then the Treaty of the 12th of January 1859, between Great Britain and Russia, Article XIX, says.

In regard to commerce and navigation in the Russian possessions on the North West Coast of America, the Convention concluded at St. Petersburgh on the 16th (28th) February, 1825, shall continue in force.

Mr. President, you are infinitely better acquainted with diplomatic matters, even after the study that I have had with regard to this case, than I could ever hope to be; but it does seem a strong thing to suggest that North West Coast, in these renewed Treaties, did not refer to the whole North West Coast from 54° 40′, the power of settlement becoming more and more probable, yet according to my learned friends' contention the North West Coast is used in a different sense in these Treaties, and the phrase "North West Coast", as invented by Mr. Blaine finds no place in the history of these matters.

If one could use the expression with reference to this matter as making a thing plainer which in my submission is perfectly plain. I would ask you to turn to pages 63 and 64 of the Counter Case where there appears again that which we submit, is utterly inconsistent with the narrow use of "north-west coast" contended for. In 1799 the Russian American Company got on the American side from Behring Straits to latitude 55°; it is sufficient for my purpose to deal with the American side; the Asiatic side did not vary. In 1799 the Russian Company got in terms the monopoly from Behring Straits down to latitude 55°. In 1821, just seven days after the Ukase, they got from Behring Straits down to latitude 51; that is to say Russia attempted to push the southern boundary lower than 55°. In 1829, after the Treaty—and now I will ask you to refer to page 61—you will find the reference to the 1821 charter at the bottom of that page:

The privilege of hunting and fishing *to the exclusion of all other Russian or foreign subjects* throughout the territories long since in the possession of Russia on the coasts of North-west America, beginning at the northern point of the island of Vancouver, *in latitude* 51° north, and extending to Behring Strait and beyond...

I notice in passing, so that I need not call attention to it again, that his is the only charter in which the words "foreign subjects" appear. It was in consequence of the attempt by Russia to extend her rights under the Ukase of 1821. If you will now turn over to page 62, you will find how the area of the monopoly of the Russian Company was described in the year 1829 after the Treaty. 51° was no longer possible, because they had agreed with the United States that the southern limit of their operations should be 54° 40′.

The limits of navigation and industry of the Company are determined by the Treaties concluded with the United States of America, April 5 (17), 1824, and with England, February 16 (28), 1825.

(3) In all the places allotted to Russia by these treaties there shall be reserved to the Company the right to profit by all the fur and fish industries *to the exclusion of all other Russian subjects.*

Could anybody produce the slightest authority for the suggestion that the Company lost their monopoly on the east side of Behring Sea? There is not a vestige of evidence, and I speak challenging correction by my learned friend Mr. Phelps, and asking him to refer to any document showing that it was not intended to convey the monopoly to the Russian Company from Behring Straits to 54° 40′. In 1799, it was down to 55°; and, in 1821, it was down to 51° in terms; and, in 1829, it is the whole area assigned to Russia. It must have been, and was, the whole North-West Coast of America above 54° 40′, which was the part exclusively assigned to Russia, as compared to that below, which was exclusively assigned to the United States. Observe that 54° 40′ was to be the dividing line, and yet it is necessary, for the purpose of my learned friends' argument, for them to contend for the first time that of which there is not a trace during 100 years of the history of this matter, that the Russian Company had not the monopoly on the eastern shore of Behring Sea.

Now, look at page 63 of the Counter Case, where you will observe the renewal suggested in the year 1865:

The Minister proposed, in paragraph 15, to reserve to the Company the exclusive right of engaging in the fur-trade as defined within the following limits:

On the peninsula of Alaska, reckoning as its northern limit a line drawn from Cape Douglas, in Kenia Bay, to the head of Lake Imiamna; on all the islands lying along the coast of that peninsula; on the Aleutian, Commander, and Kurile Islands and those lying in Behring's Sea, and also along the whole western coast of Behring's Sea.

I had better show you where that is. The line goes across the Alaskan peninsula; and what they intended to give to the Russian Company was the Peninsula and the Aleutian Islands in Behring Sea, the west coast and what they proposed to take away from them was, down to 54° 40′ and the eastern side of the Behring Sea. And the United States suggest the Russian people did not know what they were talking about, and that "eastern" meant "western"; the words are—

n the district to the north-east of the peninsula of Alaska along the whole coast to the boundary of the British possessions—

that, of course, means from about Kadiak Island, where the line comes out, to 54° 40′,—

also on the islands lying along this coast, including in that number Sitka and the whole Koloshian archipelago, *and also on land, to the northern extremity of the American Continent,* the privilege granted to the Company of the exclusive prosecution of the said industry and traffic.

Or, in other words, they were to have nothing on the North-West Coast of America south and east of Kadiak Island or north of the

boundary of the Alaskan Peninsula there described as Cape Douglas, which is in Kenia Bay, which is just about the northern end of Kadiak Island, and the other Bay is over towards Bristol Bay.

Therefore, it proceeded to withdraw from the monopoly the eastern side of Behring Sea, and to retain to them the western.

Now, this is a conclusive argument against the United States contention, and how do they deal with it. I am afraid I must trouble you to look at page 77, volume I, United States Appendix, paragraph 15. This is the proposal for renewal in the year 1865. They proposed to reserve—

to the Russian American Company until January 1st, 1882, the exclusive right of engaging in the fur trade within the following limits only: On the peninsula of Alaska, taking for its northern boundary the line from Cape Douglas, in the Bay of Kenai, to the upper shore of Iliamna Lake; upon all the islands situated along the coast of that peninsula, namely, the Aleutian Islands, the Commander Islands, the Kurile Islands, as well as upon the islands situated in Behring Sea, and along the whole western shore of Behring Sea.

And then, with a boldness to which in other Courts I might give a stronger name—but I will not before this Tribunal use any other word than boldness—they put a foot note,

it is clear from the context that it is intended to refer to the eastern shore of Behring Sea.

There is not the slightest warrant for it, if you will read on what they were going to withdraw:

As regards the region stretching northeast of the Alaska Peninsula, along the whole of the coast up to the boundary line contiguous with the possessions of Great Britain, and on the islands situated along that coast, including Sitka and the whole of the Koloshian archipelago, and likewise, on the continent of the northern part of America—

That was the eastern part of Behring Sea—as to which the privilege is to be abolished. Therefore, Mr. President, the stress of the argument leads the United States to this position, that they are obliged to rely upon a contention for which there is no affirmative support in the whole of the original documents, from the year 1820 up till the year 1865, and they are obliged to alter and change a word in an original Russian document, so as to make it meaningless, or otherwise their contention about the North West Coast falls to the ground. I submit that when a contention requires such arguments as that it is not one that will receive judicial support.

Now I will assume, for the purpose of my argument that I have satisfied you that Behring Sea was included in the words "Pacific Ocean" in the Treaties of 1824 and 1825, and that the only assertion of right which was made by Russia was the right contained in the Ukase of 1821 to prohibit the access of ships within 100 miles of her coasts on both eastern and western shores of Behring Sea as well as further down upon the coast.

Let me for a few moments remind you of the questions I have been examining before I pass on. The first Question as you know by heart is this:

What exclusive jurisdiction in the sea now known as the Behring Sea and what exclusive right in the seal fisheries therein did Russia assert—

It is not too much to say that Russia asserted nothing except that which is contained in the Ukase of 1821. That is the only assertion to which my learned friends are able to point—

—"and what exclusive rights in the seal fisheries therein did Russia assert and exercise?"

up to 1867? Mr. President, this is a Court in which, although the rules of evidence are fortunately in one sense lax—though matters of history, matters of repute and matters of report have been examined—although the widest range has been permitted to the United States to bring before this Tribunal anything which they can prove or produce in support of their allegation or assertion of an exercise by Russia, from beginning to end of the papers as they stand to-day—the Case, Counter Case, and oral or written argument—there is not a single act of exercise proved or even suggested by Russia. We stand in this position, that the Ukase of 1821, as was proved by my learned friend the Attorney General—and I will not go over that ground again—was never exercised or acted upon. The Ukase was withdrawn.

Senator MORGAN.—Before you leave that Sir Richard, how could Russia withdraw something she had never asserted?

Sir RICHARD WEBSTER.—The point would be this. I should be entitled to claim a wider finding on the part of Great Britain than I was prepared to admit, I was going to say, from the point of view of mere assertion.

Senator MORGAN.—I was speaking of the use and enjoyment for a great many years of the products of fur-bearing animals.

Sir RICHARD WEBSTER.—All I can say is this; speaking of this as exclusive jurisdiction, and assertion and exercise, there is not upon the high seas, or outside territorial waters, the suggestion of any exclusive enjoyment.

Senator MORGAN.—Then she had nothing to surrender.

Sir RICHARD WEBSTER.—I am sure it was my fault, but I was not speaking of surrendering; I never used the word "surrender". I say the Treaty of 1824 and 1825 was a bargain by Russia she would not impede or interfere with the rights of the United States and Great Britain on the high seas. There is no question of surrender—there was nothing to surrender. Russia attempted to interfere. That interference had been protested against; that interference had been abandoned; and then there is the promise that Russia will not interfere again. But that is not a surrender; that is a statement made in the most solemn manner,—an acknowledgment that the attempted interference could not be insisted upon. But that is no surrender.

Take the case of my own country years ago, when she used to order that vessels should lower top-sails within a certain distance wherever they met a British ship or within some arbitrary limits. Ultimately a nation says: "I am not any longer going to do it." To a nation that has never been put under that restriction, it is no surrender to say: 'We will no longer *insist* on your doing it—it is an acknowledgment that we are not trying to enforce a right against you". With great deference, the whole distinction is this: That the first Article of that Treaty did not grant or give to the United States, or to Great Britain, anything—they only acknowledged that Russia—I will not use the expression, had been *wrong* if it be thought that that be too much to say of a great Nation—that Russia no longer insisted upon a claim which, in a moment of inadvertence at the dictation of the Russian American Company she had thought fit to make. I do not call that a *surrender*—she had no rights which she was surrendering—she was simply saying: "I will not put a gate up; I will not hinder you from pursuing your lawful right." I have (to put an illustration) the right to go along a certain road. A man puts a gate across it and stops me. I say to that man: "Take that gate down." He says: "Yes, I will take it down; I will not put it up again." That is no surrender. There-

fore I submit you have not to consider the question of anything more, for this purpose, than the assertion and exercise of exclusive rights in Behring Sea and in the Seal fisheries in Behring Sea—(not on the *islands;* nobody suggests we are talking about the islands in Behring Sea)—by Russia prior to the cession to America in 1867.

Senator MORGAN.—If you will allow me to call attention to it, you identify this fishery with the right of navigation and whale fisheries, or other fisheries if you please; and it is a matter open to argument to say the least of it, whether Russia in her Treaties of 1824 and 1825 intended to abandon what she had so long exercised,—the right of controlling the taking of fur bearing animals within Behring Sea.

Sir RICHARD WEBSTER.—With great deference, Russia had never controlled, or exercised any control over seal fisheries on the high seas of Behring Sea at all.

Senator MORGAN.—That is assumed by the other side.

Sir RICHARD WEBSTER.—Forgive me putting it to you—where is the evidence of it? Russia had never lifted hand nor foot with reference to the seal fisheries on the high seas, and I absolutely deny for this purpose, there is any difference between whales and seals. There is no greater crime committed by a person who shoots a seal on the high seas, than by a person who harpoons, or spears a whale. Do not ask me to argue the question of property at the present moment—I am not upon it; but with reference to the observation—I submit to you we are dealing with rights alleged in the seal fisheries properly so called in the high seas of Behring Sea,—Russia as to these had done nothing; and therefore arguing on the premiss with which you were good enough to start, couched in some general terms, that Russia had done everything to control the seal fisheries in Behring Sea, I submit—she had done nothing.

Senator MORGAN.—I am not making the assertion on my own part, I am only asserting what I suppose to be insisted on by the other side.

Sir RICHARD WEBSTER.—My word is no better and no worse than that of my friends Mr. Phelps and Mr. Carter—and I say their saying "Russia asserted and exercised rights," does not prove it. Through the whole length and breadth of the books which I have read more than once—there is not a trace of Russia controlling or exercise any rights in seal fishing outside territorial waters in Behring Sea—not a vestige. Whenever Russia asserted rights—such as the notice to her cruisers to prevent people from landing—to prevent people going in territorial waters—to prevent persons from occupying places upon the land and becoming members of guilds and things of that kind—this notice had nothing in the world to do with the exercise of rights upon the high seas.

The PRESIDENT.—I think there are parts of documents which I have already alluded to whilst Mr. Carter or Sir Charles Russell was arguing—which implied, I will not say the assertion as Mr. Carter disclaimed the word, but the affirmation of the right by Russia of controlling the whole of Behring Sea—the theoretical affirmation at any rate of Russia considering herself as being in a manner *authorized* to control the whole of the Behring Sea.

Sir RICHARD WEBSTER.—Mr. President, I did not for a moment imagine you would think I was overlooking that. If it had been necessary for me to argue that Russia claimed to close the whole of this sea, there is distinct proof that she did so claim. Mr. de Poletica said in his letter—I quote from memory but I do not think I am quoting inaccurately—I would have you know that this sea has all the incidents of

shut seas—mers fermées. But my friends disclaim it. It is in my favor, Sir, to make that contention. Upon the mere question of assertion I care not how wide the claims of Russia were—my point was entirely upon *exercise*.

The PRESIDENT.—I suppose under the Treaty it is our duty to deal the question of assertion as well as the exercise of it?

Sir RICHARD WEBSTER.—I did not venture to dictate to you as to what construction you would put upon Russia's assertion. If you will remember, I spoke of it as an assertion of right by the Ukase of 1821. If that was an assertion of right, or if all the documents with which it was accompanied shew that it was an assertion of right to treat Behring Sea as a closed sea, I agree, it is your duty so to find. But my friends will not have that. My friends in the exercise of their judgment have thought fit to say: "Russia never did assert that right: Russia only asserted the right to exclude vessels 100 miles from its coasts as a defensive regulation; and they are pleased, in the exercise of their wisdom to say that was not——

The PRESIDENT.—Sir Richard I am asking you for help if you please and if you can give it to me I am sure you will help us.

Sir RICHARD WEBSTER.—Certainly.

The PRESIDENT.—Suppose neither of the parties said that Russia asserted such a right, and that in our personal conviction Russia did assert such a right, what do you think the finding ought to be?

Sir RICHARD WEBSTER.—I think the finding ought to be in accordance with your conviction, Sir. But Sir, do not misunderstand me. I have not suggested that Russia did not assert a right—I simply said that the only assertion by Russia was contained in the Ukase of 1821, and that on the most narrow construction put upon that Ukase by my friends, it was an exercise by Russia of exclusive jurisdiction to the extent of 100 miles from its shores. If you are of opinion (and I cannot say you are not justified), that the real assertion of Russia was a right to close Behring Sea and more than the sea, and that the restriction to the 100 miles was in her discretion by the making of the law which she thought fit—I hope I make my meaning clear to you, Sir.

The PRESIDENT.—Perfectly clear.

Sir RICHARD WEBSTER.—I should have thought—but that is not for me—that it was your duty to express on the Award, what the assertion of Russia was. Of course the word "assertion" may be used in two senses. It may be used in the sense of asserting that which one intends to act upon, or it may be used as a theoretical assertion not intended to be acted upon.

The PRESIDENT.—More as an affirmation than an assertion.

Sir RICHARD WEBSTER.—Exactly.

Senator MORGAN.—Will you allow me to say that an assertion might be defined by acts of exclusive enjoyment and ownership without any declaration at all.

Sir RICHARD WEBSTER.—I am not at all certain from the point of view of assertion, if exclusion mean the exclusion, the shutting out other people it would not be the best form of assertion you could possibly conceive.

Lord HANNEN.—It would be exercise also.

Sir RICHARD WEBSTER.—It would then be exercise and assertion also.

Senator MORGAN.—Is not exercise the strongest form of assertion? The law of prescription in your country and in mine—in England and in the United States—is based on occupancy, on a property right or privilege existing for 20 years.

Sir RICHARD WEBSTER.—That really is involved in what I said, and Lord Hannen has, practically speaking, pointed it by the observation he was good enough to make.

In their Counter Case they say this. I am reading from page 19.

The distinction between the right of exclusive territorial jurisdiction over Behring Sea, on the one hand, and the right of a nation on the other hand, to preserve for the use of citizens its interests on land by the adoption of all necessary even though they be somewhat unusual measures, whether on land or at sea, is so broad as to require no further exposition.

It is a very convenient thing to say that a thing is so broad that it requires no further exposition. I remember in one part of the case they say that something is much easier felt than expressed. But if you have not got a thing it is very much easier to feel it than to express it—I shall have to call attention to that on the question of property: but here they say the most simple minds can feel it, and therefore it is so broad as to require no further exposition. Then the passage proceeds:

It is the latter right, not the former, that the United States contend to have been exercised, first by Russia, and later by themselves.

Now, Mr. President, in order that you may understand the fullness of my meaning, I would adopt any form of words with regard to "assertion" which would commend itself to this Tribunal upon consideration. I care not for my purpose whether the assertion amounted to an assertion of right to close Behring Sea—I care not for my purpose whether it meant only an assertion to exclude vessels within 100 miles from the shore—it is equally immaterial, because whatever it was, was contained in a written document, namely, the Ukase of 1821. The action under that Ukase was never persisted in, on the contrary:—I do not think you want me to go again through the Duke of Wellington's letters and those other letters which show that it was not acted upon.

The PRESIDENT.—No it is not necessary.

Sir RICHARD WEBSTER.—I am sure they are quite present to your mind and I submit that the so-called surrender was not a *surrender* of anything—it was an acknowledgment of the withdrawal of an assertion which Russia had thought fit to make according to the influences then controlling her, and no doubt as the Attorney General pointed out influences largely controlled and dictated by the Company.

The PRESIDENT.—Whether it is a surrender or a withdrawal makes no practical difference.

Mr. Justice HARLAN.—What you mean to say is that whatever, in the Ukase of 1821, was inconsistent with the Treaty of 1825, was annulled.

Sir RICHARD WEBSTER.—Now the second question is: How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain? That is the next contention.

Senator MORGAN.—Before you get to that I would like to suggest this to you: That the common law of England (which is adopted also and practised in the United States; at least, adopted as a measure of right in the United States in regard to a great many privileges and powers and rights of property) contains a doctrine of title by prescription—20 years title by prescription.

Sir RICHARD WEBSTER.—I have heard of it, Sir.

Senator MORGAN.—Under which the Courts will presume the existence of a statute, will, grant, or deed, or anything, in order to secure the repose of society, and a quieting of litigation. Now with that as the origin or basis of the application of the doctrine of prescription,

nothing is needed at all, except to point to undisputed possession for 20 years.

Sir RICHARD WEBSTER.—*Exercised.*

Senator MORGAN.—Exercised, that is all that is needed. I understand an assertion by Russia of a right to property for instance, or a right of jurisdiction in Behring Sea might, as against the United States and Great Britain, to say the least of it, possibly be maintained—I do not say that it could; but it may be said as a ground of argument that it might be maintained on the ground that they had exercised these rights in respect of fur-bearing animals in Behring Sea—the right to control them, to take possession of them, make grants of monopolies or charters, upon the basis of the existence of such property there, and that that would amount perhaps to such an assertion as is mentioned in the first point in this 6th Article of this Treaty.

Sir RICHARD WEBSTER.—If I may respectfully attempt to answer you—I submit you do not help or elucidate the consideration by covering it up with generalities. Prescription is an undoubted principle both of the law of Great Britain, and, I believe, of the United States. Whether it has any application as between nations is a very much more doubtful point; but assuming it for this purpose—I think it an extremely doubtful point whether prescription has any application in such a case; but my answer, however, is a broader one—that in order to prove prescription, you must prove the existence of the right in respect of which the prescription is claimed and the exclusion of other people from that right.

Senator MORGAN.—There is no question of that.

Sir RICHARD WEBSTER.—And, in order to make one step in the direction of prescription, Russia (for I am speaking of Russia and the United States her successors) must prove this: that they alone enjoyed the right of catching seals on the high seas, and that they excluded other people from the right of catching seals on the high seas. I assert that you do not move one step towards arriving at the existence of a prescriptive right on the sea by proving you have killed seals on the land.

Senator MORGAN.—Possibly you might, by proving that you claimed the right to catch them in a certain area and that nobody else has interfered with you.

Sir RICHARD WEBSTER.—What area?

Senator MORGAN.—Behring Sea.

Sir RICHARD WEBSTER.—Now, we get much nearer the point, you will not find in the United States written Argument, a claim to exclusive jurisdiction all over Behring Sea. I could have understood this case in law, if the United States had had the courage of the convictions of some of her original advisers, and had claimed it as *mare clausum*,—I could have understood the contention which you have been good enough to put before me. But, Sir, with deference, I submit to your judgment that the moment you get to what my friend, Mr. Phelps, calls defensive regulations,—I am a little bit anticipating, but I cannot help it because you have been good enough to put the question to me,—the moment you get to what are called defensive regulations, or, in other words, the right to defend interests upon land—the right to defend these interests in territorial waters, you abandon and put away the idea that you have a prescriptive right then to claim the area outside. The whole strength and virtue of Mr. Phelps' argument, to which I shall address myself to-morrow, in reference to defensive regulations, is that they have got no rights upon the high sea

itself; but, as he has said, even assuming they have no right in the seal, no right in the seal herd, only a right to carry on the trade on land, he contends, in accordance with principles that we think erroneous, that he has a right to defend that interest by certain acts on the high seas which he endeavours to justify.

But in answer to your question I do not hesitate to put before you and I do not hesitate to submit to your judgment that an assertion and exercise of rights upon land, an assertion and exercise of rights in territorial waters, cannot detract one iota from the rights of other people upon the high seas.

Senator MORGAN.—I admit that.

Sir RICHARD WEBSTER.—You can test it in a moment. Supposing the Indian fishermen or the native Americans had been catching these seals at sea, and it was desired to stop them. The United States could not stop them on the ground of prescription. There is no greater prescription against the pelagic sealer than there was against the Indian. Stop them by legislation, possibly; stop them because they are United States citizens, possibly; stop them upon the ground that you have a right to interfere with their action within certain distances from the shore, possibly: these would be the exercise of sovereign dominion. But upon the point of view of prescription—I do not hesitate to say that a claim based upon prescription or upon an assertion that exercise on land gives foundation to a claim upon the high seas, not only will not bear investigation or examination, but it is fair to my learned friends to say that you do not find any trace of that contention in their arguments, written or oral. I confess I think it would have required very considerable boldness for any lawyer to stand up and contend that a right exercised upon the Pribilof Islands or in the territorial waters of the Pribilof Islands could by prescription give a right to the seal off Vancouver, or off Cape Flattery, or four thousand miles off in the Pacific Ocean. I shall endeavour to meet, of course, the arguments upon which that claim of property is attempted to be justified when I deal with question five.

My answer, Mr. Senator Morgan, has been a little longer than I desired it to be, but I wished, out of respect for you, to indicate an argument which should answer the suggestion you made.

I come back to the point upon which your question was founded, the second question, or rather to the point at which I was speaking when you interposed your question.

How far were these claims as to the jurisdiction of the seal fisheries recognized and conceded by Great Britain? A man cannot recognize and concede that which another person does not do. You cannot recognize and concede a right of which you have no knowledge. This recognition and concession must mean recognition and concession of a right to exclude a British ship, recognition and concession of a right to stop pelagic sealing, recognition and concession of a right of property in the seals claimed by the United States. Sir, there is not from beginning to the end of this long chapter even a suggestion by my learned friends of a recognition of any right in that sense. Recognition that the islands belonged to Russia, yes. Recognition that the territorial waters belonged to Russia, yes. Recognition that those same rights of territory and waters belonged to the United States, unquestionably. But that we have recognized what was intended to be claimed here under the first question—what I submit to this Tribunal is that there is no evidence of either recognition or concession by Great Britain in any legal or—I was going to say—any moral sense

of the word; because no act of interference with the rights of Great Britain upon the high seas from the beginning to the end of this chapter has been indicated.

The PRESIDENT.—You mean to say that Russia did not attempt to interfere before the Treaty of 1825?

Sir RICHARD WEBSTER.—Or after, Sir.

The PRESIDENT.—The period after that time was regulated by the Treaty.

Sir RICHARD WEBSTER.—That is my point, Sir. I pointed out that the Treaties gave Russia no exclusive jurisdiction on the high seas in Behring Sea; and therefore I point out that there can be no recognition or concession by Great Britain of any exclusive jurisdiction by Russia on the high seas, either in respect to the seal fishery or anything else; because from the beginning to the end of the chapter there is no assertion by Russia followed up by exercise of anything which Great Britain has conceded at all.

The PRESIDENT.—I admit that is true since 1825, since the Treaty; but before the Treaty, would it be equally true?

Sir RICHARD WEBSTER.—Equally true. They do not suggest any act of interference before 1821, excluding the paper Ukase.

The PRESIDENT.—Do you not believe that the Ukase of 1821 was the original cause of the Treaty of 1825?

Sir RICHARD WEBSTER.—I think it was absolutely the cause. The treaties were a disclaimer by Russia of the Ukase—a disclaimer at the instance of Great Britain.

Lord HANNEN.—What you say is that though Russia may have asserted some rights she never exercised them?

Sir RICHARD WEBSTER.—And Great Britain never recognized them. I have passed for the moment, Lord Hannen, from exercise to recognition and concession.

Lord HANNEN.—I know you have.

Sir RICHARD WEBSTER.—And I was pointing out that the paper Ukase was protested against by Great Britain and was withdrawn at the instance of Great Britain.

The PRESIDENT.—But this paper Ukase which was in force from 1821 to 1825 was an attempt at exercise.

Sir RICHARD WEBSTER.—It depends upon what you call in force. Writing a piece of paper which is never acted upon is not putting a thing in force. The correspondence to which attention has been called by my learned friend Sir Charles Russell, shows that from the very earliest time instructions were sent to the Russian cruisers not to act upon the Ukase. I do not want to go into that further because I think it is in your mind. You remember, Sir, that it was stated—Sir Charles Russell read it more than once, I know—that the Ukase is practically suspended; that is to say from 1821. That is Mr. George Canning's letter.

The PRESIDENT.—That is what you call no exercise.

Sir RICHARD WEBSTER.—No exercise.

The PRESIDENT.—Perhaps it would be better to call it no assertion.

Sir RICHARD WEBSTER.—I was not referring to assertion; there is I submit no meaning in recognition and concession of an assertion. You recognize and concede the right. Of course you recognize that the assertion has been made. A man says, "I possess those fields." Of course you recognize his assertion the moment it is made; but...

The PRESIDENT.—I did not say that England recognized it; but perhaps a refusal of recognizing clashed with a pre-existing state of right or of assertion.

Sir RICHARD WEBSTER.—I must make my answer clear to you, Sir. I assert that before 1821 there is no instance of exercise at all; nor, for the matter of that, is there any assertion at all.

The PRESIDENT.—I think we know about what went on at that time; that is as to the facts with which you are concerned, I mean.

Sir RICHARD WEBSTER.—I call your attention to the fact that from 1799 right away up to 1821 British vessels and American vessels were navigating and were trading in the waters affected by the Ukase; and more than that I called attention yesterday to the fact that Russia justified the making of the Ukase on the ground that the trade of the Russian-American Company was interfered with by foreign traders. I need only to remind you of it, Mr. President. My contention is that before 1821 there was neither assertion nor exercise by Russia; that in 1821 there was assertion, withdrawn in 1824–25 at the instance of the two countries, evidenced by the signing of the Treaties; that after 1821 there never was an exercise by Russia at any time.

Mr. Justice HARLAN.—You mean to say there was an assertion in 1812 to the extent of 100 Italian miles from the coast?

Sir RICHARD WEBSTER.—Or further, if it means further: it is not for me to say whether it means that or not—the learned President has been good enough to point out to me that the 100 miles might be merely a limit of their rights. It may be treated as an assertion of a still greater right; but for my purpose it is sufficient to say that there was an assertion of whatever the Ukase contained.

Mr. Justice HARLAN.—I think the printed documents in both cases agree in fact that it did not assert in 1821 jurisdiction over the open seas, outside of the 100 mile limit.

Sir RICHARD WEBSTER.—I am bound to say that M. Poletica in his letter says in so many words that the character of the coast and waters is such as to justify them in making it a shut sea and rather puts it as a matter of favour they did not extend their right.

Mr. Justice HARLAN.—He stated that they could assert it if they cared to do so, but that they did not care to do it.

Sir RICHARD WEBSTER.—That only involves the meaning of the word "assert" and what may have been meant by it.

I ask your attention for one moment only to make this concluding observation upon this. Supposing that ten years afterwards, we will say, in the year 1831, Russia had been minded to close Behring Sea or to close it down to latitude 51°, on the ground that it was a shut sea. I do not think that, assuming there was no Treaty, what M. Poletica said would be any bar to their attempting to close the sea at that time. I do not think that such a contention as this could be advanced on behalf of either great Great Britain or the United States—"You indicated that you were only going to enforce your rights to 100 miles, and that prevents you from enforcing them further." Had there been no Treaty, to use the language of a lawyer, Russia would not have been estopped from again setting up the case of *mer fermée*. I hope I have answered the question put to me. I have endeavored to do so, but I do not know that I have brought my meaning clearly to the minds of the Court.

The PRESIDENT.—You have done so with great clearness.

Sir RICHARD WEBSTER.—I thank you. I need not argue again on question 3, "Was the body of water known as Behring Sea included in the phrase 'Pacific Ocean'". I have argued that at length.

But I must say a word upon question 4. I confess, Mr. President, that I admire the courage of those who framed this Case and Counter Case. I must not distribute the merit too much; but I think General

er may claim a great part of the merit of the Case. But there is
ıt an amusing incident in connection with this fourth question.
ɜ fourth question is whether the rights of Russia pass unimpaired
ɜ United States; "Did not all the rights of Russia as to jurisdic-
ɔf the seal fisheries in Behring Sea east of the water boundary in
reaty pass unimpaired to the United States?" Of course they did.
ɜ is no doubt about it, Sir. But that is not the way in which the
ion is attempted to be interpreted by my learned friends when
framed their case. As Lord Salisbury pointed out, and as they
ɜir case remind us, Lord Salisbury said it was no part of Great
in's contention that the United States did not get all the rights
Russia had. The question was what right had Russia asserted
ɜxercised. But that is not sufficient for the United States. True
ɜir instincts they desire to press it a little further; and on page
the United States Case occurs a very remarkable statement:

March 30, 1867, the Governments of the United States and Russia celebrated
ɜy whereby all the possessions of Russia on the American continent and in the
ı of Behring Sea were ceded and transferred to the United States. This treaty,
, prior to its final consummation, had been discussed in the Senate of the
l States and by the press, was an assertion by two great nations that Russia
ɜretofore claimed the ownership of Behring Sea, and that she had now ceded
ion of it to the United States; and to this assertion no objection is ever known
ɜ been made.

, there is a very great deal of meaning in that word "ownership".
ınot help thinking that the very clever gentleman who drew this
, thought that it might be prudent even still to keep open the
ɜion of *mare clausum*. The occasion might arise when the question
e position of the waters would be important. But what does
ıership" mean; because I am entitled to look at this, as matter
bstance. The argument is this, Sir: The great nations, two of
reatest on earth, the United States and Russia, are making a bar-
That bargain is declaratory of some rights, and among others,
wnership in Behring Sea, and you, the other nations of the earth,—
objected to it. You have to come and make your objection, or
wise it will be treated against you as a public assertion that
ia claimed the ownership of Behring Sea. What does it mean?
ık, Mr. President, with your known experience in diplomatic mat-
if you had had your attention called to that clause before I read
u would have been a little startled, if you had been the represent-
of France, of your nation, or if the Marquis, as the representative
ıly, or Mr. Gram had happened to be the representative of Norway,
ıad been told that you had conceded the ownership of Behring Sea
ıssia, and through Russia, of a portion of it to the United States,
ıse you did not object to the Treaty. I may be wrong. It may be
ɜcidental statement; but I confess, knowing what was passing,
ing some of the other paragraphs in this Case, it was meant to be
as an admission of ownership, in the sense of a right to the waters,
e sea as well as territorial. It is very curious that on page 72 they
use in this connection of Lord Salisbury's very candid statement:

conclusion is irresistible from a mere reading of this instrument that all the
of Russia as to jurisdiction and as to the sealeries in Behring Sea east of
ater boundary fixed by the treaty of March 30, 1867, passed unimpaired to the
l States under that treaty. In fact, the British Government has announced
diness to accept this conclusion without dispute.

ıt is perfectly true, and I do not go back from that in any way. I
d not be entitled to, and I do not; but that is a very different
to a statement made that the two nations were asserting owner-
n Behring Sea, and that the world is bound by it.

fore I submit you have not to consider the question of anything more, for this purpose, than the assertion and exercise of exclusive rights in Behring Sea and in the Seal fisheries in Behring Sea—(not on the *islands;* nobody suggests we are talking about the islands in Behring Sea)—by Russia prior to the cession to America in 1867.

Senator MORGAN.—If you will allow me to call attention to it, you identify this fishery with the right of navigation and whale fisheries, or other fisheries if you please; and it is a matter open to argument to say the least of it, whether Russia in her Treaties of 1824 and 1825 intended to abandon what she had so long exercised,—the right of controlling the taking of fur bearing animals within Behring Sea.

Sir RICHARD WEBSTER.—With great deference, Russia had never controlled, or exercised any control over seal fisheries on the high seas of Behring Sea at all.

Senator MORGAN.—That is assumed by the other side.

Sir RICHARD WEBSTER.—Forgive me putting it to you—where is the evidence of it? Russia had never lifted hand nor foot with reference to the seal fisheries on the high seas, and I absolutely deny for this purpose, there is any difference between whales and seals. There is no greater crime committed by a person who shoots a seal on the high seas, than by a person who harpoons, or spears a whale. Do not ask me to argue the question of property at the present moment—I am not upon it; but with reference to the observation—I submit to you we are dealing with rights alleged in the seal fisheries properly so called in the high seas of Behring Sea,—Russia as to these had done nothing; and therefore arguing on the premiss with which you were good enough to start, couched in some general terms, that Russia had done everything to control the seal fisheries in Behring Sea, I submit—she had done nothing.

Senator MORGAN.—I am not making the assertion on my own part, I am only asserting what I suppose to be insisted on by the other side.

Sir RICHARD WEBSTER.—My word is no better and no worse than that of my friends Mr. Phelps and Mr. Carter—and I say their saying "Russia asserted and exercised rights," does not prove it. Through the whole length and breadth of the books which I have read more than once—there is not a trace of Russia controlling or exercise any rights in seal fishing outside territorial waters in Behring Sea—not a vestige. Whenever Russia asserted rights—such as the notice to her cruisers to prevent people from landing—to prevent people going in territorial waters—to prevent persons from occupying places upon the land and becoming members of guilds and things of that kind—this notice had nothing in the world to do with the exercise of rights upon the high seas.

The PRESIDENT.—I think there are parts of documents which I have already alluded to whilst Mr. Carter or Sir Charles Russell was arguing—which implied, I will not say the assertion as Mr. Carter disclaimed the word, but the affirmation of the right by Russia of controlling the whole of Behring Sea—the theoretical affirmation at any rate of Russia considering herself as being in a manner *authorized* to control the whole of the Behring Sea.

Sir RICHARD WEBSTER.—Mr. President, I did not for a moment imagine you would think I was overlooking that. If it had been necessary for me to argue that Russia claimed to close the whole of this sea, there is distinct proof that she did so claim. Mr. de Poletica said in his letter—I quote from memory but I do not think I am quoting inaccurately—I would have you know that this sea has all the incidents of

shut seas—mers fermées. But my friends disclaim it. It is in my favor, Sir, to make that contention. Upon the mere question of assertion I care not how wide the claims of Russia were—my point was entirely upon *exercise*.

The PRESIDENT.—I suppose under the Treaty it is our duty to deal the question of assertion as well as the exercise of it?

Sir RICHARD WEBSTER.—I did not venture to dictate to you as to what construction you would put upon Russia's assertion. If you will remember, I spoke of it as an assertion of right by the Ukase of 1821. If that was an assertion of right, or if all the documents with which it was accompanied shew that it was an assertion of right to treat Behring Sea as a closed sea, I agree, it is your duty so to find. But my friends will not have that. My friends in the exercise of their judgment have thought fit to say: "Russia never did assert that right: Russia only asserted the right to exclude vessels 100 miles from its coasts as a defensive regulation; and they are pleased, in the exercise of their wisdom to say that was not——

The PRESIDENT.—Sir Richard I am asking you for help if you please and if you can give it to me I am sure you will help us.

Sir RICHARD WEBSTER.—Certainly.

The PRESIDENT.—Suppose neither of the parties said that Russia asserted such a right, and that in our personal conviction Russia did assert such a right, what do you think the finding ought to be?

Sir RICHARD WEBSTER.—I think the finding ought to be in accordance with your conviction, Sir. But Sir, do not misunderstand me. I have not suggested that Russia did not assert a right—I simply said that the only assertion by Russia was contained in the Ukase of 1821, and that on the most narrow construction put upon that Ukase by my friends, it was an exercise by Russia of exclusive jurisdiction to the extent of 100 miles from its shores. If you are of opinion (and I cannot say you are not justified), that the real assertion of Russia was a right to close Behring Sea and more than the sea, and that the restriction to the 100 miles was in her discretion by the making of the law which she thought fit—I hope I make my meaning clear to you, Sir.

The PRESIDENT.—Perfectly clear.

Sir RICHARD WEBSTER.—I should have thought—but that is not for me—that it was your duty to express on the Award, what the assertion of Russia was. Of course the word "assertion" may be used in two senses. It may be used in the sense of asserting that which one intends to act upon, or it may be used as a theoretical assertion not intended to be acted upon.

The PRESIDENT.—More as an affirmation than an assertion.

Sir RICHARD WEBSTER.—Exactly.

Senator MORGAN.—Will you allow me to say that an assertion might be defined by acts of exclusive enjoyment and ownership without any declaration at all.

Sir RICHARD WEBSTER.—I am not at all certain from the point of view of assertion, if exclusion mean the exclusion, the shutting out other people it would not be the best form of assertion you could possibly conceive.

Lord HANNEN.—It would be exercise also.

Sir RICHARD WEBSTER.—It would then be exercise and assertion also.

Senator MORGAN.—Is not exercise the strongest form of assertion? The law of prescription in your country and in mine—in England and in the United States—is based on occupancy, on a property right or privilege existing for 20 years.

Sir RICHARD WEBSTER.—That really is involved in what I said, and Lord Hannen has, practically speaking, pointed it by the observation he was good enough to make.

In their Counter Case they say this. I am reading from page 19.

The distinction between the right of exclusive territorial jurisdiction over Behring Sea, on the one hand, and the right of a nation on the other hand, to preserve for the use of citizens its interests on land by the adoption of all necessary even though they be somewhat unusual measures, whether on land or at sea, is so broad as to require no further exposition.

It is a very convenient thing to say that a thing is so broad that it requires no further exposition. I remember in one part of the case they say that something is much easier felt than expressed. But if you have not got a thing it is very much easier to feel it than to express it—I shall have to call attention to that on the question of property: but here they say the most simple minds can feel it, and therefore it is so broad as to require no further exposition. Then the passage proceeds:

It is the latter right, not the former, that the United States contend to have been exercised, first by Russia, and later by themselves.

Now, Mr. President, in order that you may understand the fullness of my meaning, I would adopt any form of words with regard to "assertion" which would commend itself to this Tribunal upon consideration. I care not for my purpose whether the assertion amounted to an assertion of right to close Behring Sea—I care not for my purpose whether it meant only an assertion to exclude vessels within 100 miles from the shore—it is equally immaterial, because whatever it was, was contained in a written document, namely, the Ukase of 1821. The action under that Ukase was never persisted in, on the contrary:—I do not think you want me to go again through the Duke of Wellington's letters and those other letters which show that it was not acted upon.

The PRESIDENT.—No it is not necessary.

Sir RICHARD WEBSTER.—I am sure they are quite present to your mind and I submit that the so-called surrender was not a *surrender* of anything—it was an acknowledgment of the withdrawal of an assertion which Russia had thought fit to make according to the influences then controlling her, and no doubt as the Attorney General pointed out influences largely controlled and dictated by the Company.

The PRESIDENT.—Whether it is a surrender or a withdrawal makes no practical difference.

Mr. Justice HARLAN.—What you mean to say is that whatever, in the Ukase of 1821, was inconsistent with the Treaty of 1825, was annulled.

Sir RICHARD WEBSTER.—Now the second question is: How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain? That is the next contention.

Senator MORGAN.—Before you get to that I would like to suggest this to you: That the common law of England (which is adopted also and practised in the United States; at least, adopted as a measure of right in the United States in regard to a great many privileges and powers and rights of property) contains a doctrine of title by prescription—20 years title by prescription.

Sir RICHARD WEBSTER.—I have heard of it, Sir.

Senator MORGAN.—Under which the Courts will presume the existence of a statute, will, grant, or deed, or anything, in order to secure the repose of society, and a quieting of litigation. Now with that as the origin or basis of the application of the doctrine of prescription,

nothing is needed at all, except to point to undisputed possession for 20 years.

Sir RICHARD WEBSTER.—*Exercised.*

Senator MORGAN.—Exercised, that is all that is needed. I understand an assertion by Russia of a right to property for instance, or a right of jurisdiction in Behring Sea might, as against the United States and Great Britain, to say the least of it, possibly be maintained—I do not say that it could; but it may be said as a ground of argument that it might be maintained on the ground that they had exercised these rights in respect of fur-bearing animals in Behring Sea—the right to control them, to take possession of them, make grants of monopolies or charters, upon the basis of the existence of such property there, and that that would amount perhaps to such an assertion as is mentioned in the first point in this 6th Article of this Treaty.

Sir RICHARD WEBSTER.—If I may respectfully attempt to answer you—I submit you do not help or elucidate the consideration by covering it up with generalities. Prescription is an undoubted principle both of the law of Great Britain, and, I believe, of the United States. Whether it has any application as between nations is a very much more doubtful point; but assuming it for this purpose—I think it an extremely doubtful point whether prescription has any application in such a case; but my answer, however, is a broader one—that in order to prove prescription, you must prove the existence of the right in respect of which the prescription is claimed and the exclusion of other people from that right.

Senator MORGAN.—There is no question of that.

Sir RICHARD WEBSTER.—And, in order to make one step in the direction of prescription, Russia (for I am speaking of Russia and the United States her successors) must prove this: that they alone enjoyed the right of catching seals on the high seas, and that they excluded other people from the right of catching seals on the high seas. I assert that you do not move one step towards arriving at the existence of a prescriptive right on the sea by proving you have killed seals on the land.

Senator MORGAN.—Possibly you might, by proving that you claimed the right to catch them in a certain area and that nobody else has interfered with you.

Sir RICHARD WEBSTER.—What area?

Senator MORGAN.—Behring Sea.

Sir RICHARD WEBSTER.—Now, we get much nearer the point, you will not find in the United States written Argument, a claim to exclusive jurisdiction all over Behring Sea. I could have understood this case in law, if the United States had had the courage of the convictions of some of her original advisers, and had claimed it as *mare clausum*,—I could have understood the contention which you have been good enough to put before me. But, Sir, with deference, I submit to your judgment that the moment you get to what my friend, Mr. Phelps, calls defensive regulations,—I am a little bit anticipating, but I cannot help it because you have been good enough to put the question to me,—the moment you get to what are called defensive regulations, or, in other words, the right to defend interests upon land—the right to defend these interests in territorial waters, you abandon and cut away the idea that you have a prescriptive right then to claim the area outside. The whole strength and virtue of Mr. Phelps' argument, to which I shall address myself to-morrow, in reference to defensive regulations, is that they have got no rights upon the high sea

itself; but, as he has said, even assuming they have no right in the seal, no right in the seal herd, only a right to carry on the trade on land, he contends, in accordance with principles that we think erroneous, that he has a right to defend that interest by certain acts on the high seas which he endeavours to justify.

But in answer to your question I do not hesitate to put before you and I do not hesitate to submit to your judgment that an assertion and exercise of rights upon land, an assertion and exercise of rights in territorial waters, cannot detract one iota from the rights of other people upon the high seas.

Senator MORGAN.—I admit that.

Sir RICHARD WEBSTER.—You can test it in a moment. Supposing the Indian fishermen or the native Americans had been catching these seals at sea, and it was desired to stop them. The United States could not stop them on the ground of prescription. There is no greater prescription against the pelagic sealer than there was against the Indian. Stop them by legislation, possibly; stop them because they are United States citizens, possibly; stop them upon the ground that you have a right to interfere with their action within certain distances from the shore, possibly: these would be the exercise of sovereign dominion. But upon the point of view of prescription—I do not hesitate to say that a claim based upon prescription or upon an assertion that exercise on land gives foundation to a claim upon the high seas, not only will not bear investigation or examination, but it is fair to my learned friends to say that you do not find any trace of that contention in their arguments, written or oral. I confess I think it would have required very considerable boldness for any lawyer to stand up and contend that a right exercised upon the Pribilof Islands or in the territorial waters of the Pribilof Islands could by prescription give a right to the seal off Vancouver, or off Cape Flattery, or four thousand miles off in the Pacific Ocean. I shall endeavour to meet, of course, the arguments upon which that claim of property is attempted to be justified when I deal with question five.

My answer, Mr. Senator Morgan, has been a little longer than I desired it to be, but I wished, out of respect for you, to indicate an argument which should answer the suggestion you made.

I come back to the point upon which your question was founded, the second question, or rather to the point at which I was speaking when you interposed your question.

How far were these claims as to the jurisdiction of the seal fisheries recognized and conceded by Great Britain? A man cannot recognize and concede that which another person does not do. You cannot recognize and concede a right of which you have no knowledge. This recognition and concession must mean recognition and concession of a right to exclude a British ship, recognition and concession of a right to stop pelagic sealing, recognition and concession of a right of property in the seals claimed by the United States. Sir, there is not from beginning to the end of this long chapter even a suggestion by my learned friends of a recognition of any right in that sense. Recognition that the islands belonged to Russia, yes. Recognition that the territorial waters belonged to Russia, yes. Recognition that those same rights of territory and waters belonged to the United States, unquestionably. But that we have recognized what was intended to be claimed here under the first question—what I submit to this Tribunal is that there is no evidence of either recognition or concession by Great Britain in any legal or—I was going to say—any moral sense

of the word; because no act of interference with the rights of Great Britain upon the high seas from the beginning to the end of this chapter has been indicated.

The PRESIDENT.—You mean to say that Russia did not attempt to interfere before the Treaty of 1825?

Sir RICHARD WEBSTER.—Or after, Sir.

The PRESIDENT.—The period after that time was regulated by the Treaty.

Sir RICHARD WEBSTER.—That is my point, Sir. I pointed out that the Treaties gave Russia no exclusive jurisdiction on the high seas in Behring Sea; and therefore I point out that there can be no recognition or concession by Great Britain of any exclusive jurisdiction by Russia on the high seas, either in respect to the seal fishery or anything else; because from the beginning to the end of the chapter there is no assertion by Russia followed up by exercise of anything which Great Britain has conceded at all.

The PRESIDENT.—I admit that is true since 1825, since the Treaty; but before the Treaty, would it be equally true?

Sir RICHARD WEBSTER.—Equally true. They do not suggest any act of interference before 1821, excluding the paper Ukase.

The PRESIDENT.—Do you not believe that the Ukase of 1821 was the original cause of the Treaty of 1825?

Sir RICHARD WEBSTER.—I think it was absolutely the cause. The treaties were a disclaimer by Russia of the Ukase—a disclaimer at the instance of Great Britain.

Lord HANNEN.—What you say is that though Russia may have asserted some rights she never exercised them?

Sir RICHARD WEBSTER.—And Great Britain never recognized them. I have passed for the moment, Lord Hannen, from exercise to recognition and concession.

Lord HANNEN.—I know you have.

Sir RICHARD WEBSTER.—And I was pointing out that the paper Ukase was protested against by Great Britain and was withdrawn at the instance of Great Britain.

The PRESIDENT.—But this paper Ukase which was in force from 1821 to 1825 was an attempt at exercise.

Sir RICHARD WEBSTER.—It depends upon what you call in force. Writing a piece of paper which is never acted upon is not putting a thing in force. The correspondence to which attention has been called by my learned friend Sir Charles Russell, shows that from the very earliest time instructions were sent to the Russian cruisers not to act upon the Ukase. I do not want to go into that further because I think it is in your mind. You remember, Sir, that it was stated—Sir Charles Russell read it more than once, I know—that the Ukase is practically suspended; that is to say from 1821. That is Mr. George Canning's letter.

The PRESIDENT.—That is what you call no exercise.

Sir RICHARD WEBSTER.—No exercise.

The PRESIDENT.—Perhaps it would be better to call it no assertion.

Sir RICHARD WEBSTER.—I was not referring to assertion; there is I submit no meaning in recognition and concession of an assertion. You recognize and concede the right. Of course you recognize that the assertion has been made. A man says, "I possess those fields." Of course you recognize his assertion the moment it is made; but...

The PRESIDENT.—I did not say that England recognized it; but perhaps a refusal of recognizing clashed with a pre-existing state of right or of assertion.

Sir RICHARD WEBSTER.—Entirely; but before that Act with reference to what I call the embayed and enclosed waters of the Bristol Channel, the question would depend upon the common law principle, and the principle of international law, that enclosed and embayed waters may become part of the dominion of the particular country; and I say with great respect to any argument that may be addressed on the other side, I do not think that my learned friends will find any authority to suggest that the waters in such a place as that shown on the chart, between ten and eleven miles wide at the mouth, extending 50 miles into the country, would not be regarded as otherwise than inland, embayed or enclosed waters. And the fact that they widen out to 35 miles among the islands would not remove that presumption. Of course, I do not withdraw the argument that I addressed to the Tribunal yesterday on the Treaty. The real object of that line was to determine to which nation the particular islands belonged on the one side and the other of the line laid down.

I was going to mention that a similar question arose with regard to Passamaquoddy Bay in the Bay of Fundy, and there are three or four cases where similar views have been adopted where the question turned upon the configuration of the land, the degree to which the sea was enclosed, and exactly the same considerations, Mr. President, as M. de Poletica had in his mind when, in that passage to which you called my attention yesterday he thought fit to say, erroneously it must now be admitted, the whole Pacific Ocean down to latitude 51° on the coast of the United States and of America, and latitude 47°, on the coast of Asia, had all the characteristics of shut seas and *mers fermées*.

The PRESIDENT.—Before you leave that subject, Sir Richard, I think it is my duty as the President of an International Tribunal, as this is, to remind you of the suggested distinction which you made and which you must keep to, between jurisdiction as it is fixed by internal law and international law—what may be and ought to be considered as international law. I perfectly admit that in such instances as this strait of Juan de Fuca and also in the case of the Norwegian fiords, that any nation, as far as it concerns its own nationals, has a right to fix the limits of her jurisdiction. That, I believe, everyone who has studied international law and every lawyer who is competent on the question, will admit. As to the international validity of such a pretension, that is another question, and I believe that we must stick to the point that it is a question in each particular case how far the general assent of particular seafaring nations may go. That is an open question ,and may be solved differently, not only in different cases, but in different times. It may account for the ancient pretensions put forward by Great Britain in the time of Selden, which the Russians seem to have put forward as regards the Behring Sea in the time of M. de Poletica. It may account also for your explanation of the Treaty, which is also an explanation of Mr. Senator Morgan, between the United States and Great Britain as concerns the straits of Juan de Fuca. I myself will ask you not to accept any definite opinion about it, and I put my own reservation forward, inasmuch as I do not know how far this necessary regard of other nations may go. I will say, with all due respect for my very learned colleague Mr. Gram, that I would give it as an answer concerning the fiords of Norway. I find nothing incompatible with the extension of a three-mile limit principle to a larger extent, if and when the assent of other nations is secured. That is a question of fact; that is a question of tradition; that is a question open to examination. Under those reservations, I will ask you to proceed.

Sir RICHARD WEBSTER.—May I remind you, Sir, that what you have indicated is exactly in accordance with the view I ventured to present yesterday, and which the Attorney General presented, that the arrangement made by treaty between these two nations, the United States and Great Britain, in this case, would not in any way preclude other nations from contending that the terms of the agreement were not binding on other nations; but that other nations could contend they were waters of the high sea, and it would be a question, as far as other nations being bound, either of acquiescence and assent, or of the configuration of the land round the waters being such as, applying to the argument the principles of international law, they are to be regarded as being inland sea.

Senator MORGAN.—In order that another authority or citation of an instance may be examined by counsel on both sides, I desire to call attention to the action of Great Britain, the United States, the Netherlands, and France, in 1862 or 1863, in going to war with Japan and compelling her to admit merchant-ships to pass through the Straits of Shimonoseki. There, one of the feudal Princes, Prince of Negato, had fortified a pass through the Straits of Shimonoseki, which was not more than a mile and a half wide, and stationed three ships-of-war there, and the United States Government, leading off in one year, the British Government followed it the next, they succeeded in bringing Japan to terms, and compelling her to admit that that was part of the open sea. Four great nations were concerned in forcing her to admit that that strait, a mile and a half wide, was open sea.

Sir RICHARD WEBSTER.—I will gladly examine into that matter; but I would answer at once that the reply seems obvious. It is clear, whatever may have been the question of legal rights, the nations thought fit to enforce their claims by power, and not by the exercise of any legal rights. And I rather think it will be found the cause of the war, so far as Great Britain was concerned, was an actual attack on some of her vessels.

Senator MORGAN.—Yes. She claimed the ancient right to pass through as part of the high seas. That is all.

Sir RICHARD WEBSTER.—Now, I should like to pass from the subject if I may by reminding you that in a very celebrated case of Conception Bay, which formed the subject of discussion in the Privy Council, and is reported in our Law Reports, (in the 2nd volume of Appeal Cases, at page 420), the ground of the judgment as to the right to regard these waters and this bay as interior waters was put upon the acquiescence by other nations, and, therefore, that has been, as you most propperly pointed out, one of the principal things to be considered in connection with any extension of territorial rights either in a particular locality or in the question of the general marginal belt which is to be regarded as being territorial waters, near to the shores of a country.

The PRESIDENT.—I am very happy to think that this question of the definition of "territorial waters" does not altogether lie before us. I know that it has given a great deal of trouble some 60 years ago in the case of the Plate River which was also a difficult instance to know where the open sea ends and the interior water begins. There are many difficult instances of that sort; but I believe the general principle is the general assent of seafaring nations.

Sir RICHARD WEBSTER.—Mr. President, as I said yesterday, in substance I had concluded all I desired to say on the four questions first enumerated in Article VI because you will remember my criticism or my argument upon them in connection with the Juan de Fuca Treaty,

arose out of the passage in the Counter Case and the Case to which I called attention, where the Treaty of 1867 was dealt with; and, practically speaking, I am almost in a position to pass to question 5.

One topic only I wish to notice before doing so. It is suggested more than once, in the United States Case and Counter Case, that whatever may have been the rights on the legal position with regard to these first four questions, the United States in purchasing Alaska had the seal industry in view, had the Pribilof Islands in view, and that induced them to give the sum of seven million dollars for that territory.

Sir, I desire to make a perfectly frank admission—that from the point of view of the legal rights of the United States, it makes no difference at all whether they knew of the Pribilof Islands, or did not; whether they knew of the fur-industry, or did not; and I admit their rights are as great and as large—that it strengthens my argument in no respect to show that they were ignorant either of the Pribilof Islands, the value of the fur-industry, or anything else. But it is at any rate right that I should, in a very few sentences, point out to this Tribunal, that the allegations contained in the United States Case, and the Counter Case, are not well founded, because it then removes from the claim of the United States what I may call some cause of equitable complaint, which otherwise might be supposed to be allowed to be invoked in their favor. The first of the two passages to which I refer will be found on page 74 of the Case of the United States speaking of the Pribiloff Islands and the fur trade, in these words:

> Their value was well known to the American negotiators of the Treaty of 1867, and while it must be admitted that political considerations entered into the negotiations to a certain extent, yet so far as revenue to the Government and immediate profits to its people were concerned, it will appear from a careful study of the incidents attending the transfer of sovereignty that it was the fur industry more than all other considerations which decided the United States to pay the sum of seven million two hundred thousand dollars required by Russia for the cession and transfer of her sovereign rights and property.

Well, Sir, whoever is responsible for the framing of this Case—I must not, of course, speculate—all I can say is, it would have been more satisfactory to the Tribunal—perhaps, a little fairer to those who had to argue on the other side—if the incidents attending the transfer (the careful study of which will show that it was the value of the fur-industry that induced the United States to pay this price) had been stated. As far as we can gather from the evidence before the Tribunal the incidents are all the other way. I will in a moment call attention to what the evidence is, but in the Counter Case when the whole matter had been discussed by Great Britain in their Case (as I shall show directly) they repeat the allegation in these words.

It is to be found at page 30 of the Counter Case of the United States:

> First. That soon after the discovery by Russia of the Alaskan regions, and at a very early period in her occupancy thereof, she established a fur-seal industry on the Pribilof Islands and annually killed a portion of the herd frequenting those islands for her own profit and for the purposes of commerce with the world; that she carried on, cherished, and protected this industry by all necessary means, whether on land or at sea, throughout the whole period of her occupancy and down to the cession to the United States in 1867; and that the acquisition of it was one of the principal motives which animated the United States in making the purchase of Alaska.

Mr. President, for a few moments, and for a few moments only, I will show you upon the evidence that neither of those allegations is well founded, and from the point of view of equitable claim to have the so-called industry protected on the ground of their having considered it in the price, the evidence does not support the contention of the

United States. Of course, one obvious comment arises at once, and that is this: it is a remarkable thing, if they had this knowledge, that for a year and a half if not for two years, they permitted the wholesale slaughter which, according to their own statement, and perfectly fair statement, to-day, was extremely detrimental to the United States. But I am not going to rely upon negative matters at all. I am going to rely upon positive and affirmative testimony with regard to this matter. I will call attention first, Mr President, to page 70 of the British Counter Case. The United States without mentioning any date had referred at pages 75 and 76 of their Case to a Congressional Committee which sat in the year 1888. They do not mention the date, but it is the fact that it sat in the year 1888.

Mr. Justice HARLAN.—1888?

Sir RICHARD WEBSTER.—1888; and that Committee is referred to as if it was of a much earlier date, but I have no doubt that was by inadvertence. The report of that Committee will be found on page 86.

General FOSTER.—It states the date. There is no inadvertence about it.

Sir RICHARD WEBSTER.—With deference, it does not.

General FOSTER.—At the bottom of page 77, it says it was the 50th Congress.

Sir RICHARD WEBSTER.—I beg General Foster's pardon. I have not such an intimate acquaintance as General Foster with these dates, and I do not suppose many members of the Tribunal have.

The PRESIDENT.—What date would that be?

Sir RICHARD WEBSTER.—1888, but I merely make the observation in passing, that to anybody reading the Case there is nothing to show that the transition at the bottom of page 75 from the period of 1867, refers to as late a date as 1888. On page 75 they refer to it in this way, after referring to Mr. Sumner's speech in 1867.

The Congressional Committee, after making various quotations from official and other sources, further states: It seems to the committee to have been taken for granted that by the purchase of Alaska—

The Tribunal will kindly note this.

the United States would acquire exclusive ownership of and jurisdiction over Behring Sea, including its products.

If that is anything, that is *mare clausum*. Then it goes on:

The fur-seal, sea-otter, walrus, whale, codfish, salmon, and other fisheries; for it is on account of these valuable products that the appropriation of the purchase money was urged.

Will you kindly note that the Congressional Committee so far even, from its report in 1888, supporting the statement that it was principally the fur-seals, say that it was:

Exclusive ownership of and jurisdiction over Behring Sea, including its products—the fur-seal, sea otter, walrus, whale, codfish, salmon, and other fisheries.

Then it goes on:

The extracts above quoted in reference to these products are emphasized by the fact that the fur-seal fisheries alone have already yielded to the Government a return greater than the entire cost of the territory.

It seems clear to the committee that if the waters of Behring Sea were the "high seas" these products were as free to our fishermen and seal hunters as the Russians, and there was, therefore, no reason on that account for the purchase. But it was well understood that Russia controlled these waters; that her ships of war patrolled them, and seized and confiscated foreign vessels which violated the regulations she had prescribed concerning them; and the argument in favor of the purchase was that by the transfer of the mainland, islands, and waters of Alaska we would acquire these valuable products and the right to protect them.

Again I note the evidence upon which the Congressional Committee was led to the belief that Russia had controlled the waters, and seized and confiscated vessels, and that they were going to get the ownership and jurisdiction over Behring Sea, does not appear. But having called attention to the Report of the Committee of 1888, of course at a time when the case was jurisdiction over Behring Sea and nothing else—when this idea of defensive regulations had not occurred to the fertile imagination of anybody—that report of the Committee having been referred to at page 70 of the Counter Case to which I was directing your attention, you will find what the contemporary evidence is. I read now from page 70:

No reference is made in the United States Case to the report of any previous Committee of Congress. Such reports, however, exist, and are of a directly opposite tendency.

Now I read from the Report of the Foreign Affairs Committee in 1876. That, Mr. President, as you will remember, is one year after the purchase.

Senator MORGAN.—Which House was that?

Sir RICHARD WEBSTER.—It does not say, Sir, but I will get it from the history of Alaska. At page 70 of the British Counter Case, you will find this:

The motives which led the United States Government to purchase them [Russia's American possessions] are thus stated in a report of the committee on foreign affairs published 18th May, 1868: "They were, first, the laudable desire of citizens of the Pacific coast to share in the prolific fisheries of the oceans, seas, bays, and rivers of the Western World; the refusal of Russia to renew the Charter of the Russia-American Fur Company in 1866; the friendship of Russia for the United States; the necessity of preventing the transfer, by any possible chance, of the north-west coast of America to an unfriendly Power."

I wonder whether that Committee thought that North-west coast meant from 60° down to 54°! It goes on:

The creation of new industrial interests on the Pacific necessary to the supremacy of our empire on the sea and land; and finally, to facilitate and secure the advantages of an unlimited American commerce with the friendly Powers of Japan and China.

I pass the reference here to Mr. Elliott. I shall have to refer to that later on and show that he was absolutely right; but I pass from that for the moment, as I do not want to argue on any contested matter. I am taking the reports from the official sources of the United States which are not suggested in any shape or way to be otherwise than worthy of credit. I call attention to the report of the evidence of Mr. Williams before that Committee of Congress to which reference has been made. It is quoted on page 72. He said:

I do not think, when the Government made the purchase from Russia, that any one outside of a dozen people, perhaps, who had been acquainted with sealing heretofore, had the slightest knowledge of there being any value in those islands, or that the Government was going to get anything of value outside the mainland of Alaska.

And, then, Mr. President, upon the suggestion that the value to the Government enhanced the price they were willing to pay, let me read an extract from the evidence of Dr. Dall, a gentleman who (as I shall shew at another stage of this case), has been more than once referred to by the United States, and whose evidence is used on other points; but I will read, merely for this purpose, the extract set out at page 73:

I said that in 1866 (not "in the early days of the industry") I purchased first-class fur-seal skins at 12 1/2 cents a-piece, that being the price at which they were sold by the Russians. The point of this observation lies in its application to the oft-repeated

atement that, as Mr. Palmer says, 'little stress was laid upon the fact that fur-seals ere found in abundance' at the time of the purchase of the Territory by the United :ates. No stress could reasonably have been laid upon it, since 100,000 seals would ; that time have been worth only some 12,500 dollars, which would hardly have paid r the trouble of taking them. Of course, almost immediately afterwards this was o longer true.

Now, Sir, I said yesterday, and I venture to repeat the observation o-day, this is a Tribunal in which, although the rules of evidence are roperly extremely free, liberal and lax, yet still the assertion of Coun-el, the assertion of Agents in the case, go for nothing unless there s evidence to support them; and I submit to this Tribunal that it is ot in any way proved,—not only is it not proved, but I have shown vidence before this Tribunal which, speaking of contemporary utter-nces,—speaking of contemporary documents,—shows that the United tates did not in any way regard either the Pribilof Islands or the ur-industry as bearing upon the question of price which they were illing to pay.

The PRESIDENT.—Perhaps, in reference to this last quotation from r. Dall, do you not think that perhaps the low price paid for fur-seal kins would have been owing to the circumstance that fur-seals were ot yet hunted in that time, and that sea-otters were more likely to ave been hunted?

Sir RICHARD WEBSTER.—I think that is highly probable.

The PRESIDENT.—And those had but a small value.

Sir RICHARD WEBSTER.—It strengthens my remark. I am not on he question of what the *cause* was; I am on the question of fact, that he allegation that the United States were being hardly dealt with ecause they paid for this a high price, is unfounded on the facts of istory, and upon the facts which are before the Court. Now, let me ass from that.

Mr. Justice HARLAN.—Did not Mr. Sumner in his speech refer to the mmense number of fur-seals?

Sir RICHARD WEBSTER.—I should like to be allowed to answer that. did not mean to refer to it because it would certainly, to an extent, respass upon what I may call contentious matter,—certainly not in the ense of enhancing the value of the purchase; but, as I am challenged, will read the passage.

Mr. Justice HARLAN.—I do not mean to challenge you, Sir Richard.

Sir RICHARD WEBSTER.—I beg Judge Harlan's pardon; I did not ean in that sense.

Mr. Justice HARLAN.—I think the passage has been read once; and is not worth while to read it again, unless you want it.

Sir RICHARD WEBSTER.—The passage to which I was going to refer as not been read. I really should not have troubled about it, but that ou were good enough to indicate to me that perhaps my statement ight be a little too wide. I do not think it is at all.

The summary of the advantages which is referred to in the citation of r. Elliott which I did not read (at page 70 of the British Counter ase), is to be found at page 88 of volume 1 of the Appendix to the ritish Case; and it really does rather point the strength of my obser-ation, although I can assure the learned Judge I did not mean to fer to it again. I had quite sufficient else to say, and I should not ave referred to it, but for his calling my attention to it. Mr Sumner ad given a very long and elaborate description of all the various idustries. He had referred among others (as the learned Judge has minded me), to the capture of seals, of sea-otter, and of other fur-

bearing animals; and then the summary to which Mr. Elliott's referred in his passage,—and which it was suggested by the United States Counter Case to be an inaccurate reference,—is in these words.

Mr. President, I now conclude this examination. From a review of the origin of the Treaty, and the general considerations with regard to it, we have passed to an examination of the possessions under different heads, in order to arrive at a knowledge of their character and value; and here we have noticed the existing Government which was found to be nothing but a Fur Company, whose only object is trade; then the population, where a very few Russians and creoles are a scanty fringe to the aboriginal races; then the climate, a ruling influence, with its thermal current of ocean and its eccentric isothermal line, by which the rigours of that coast are tempered to a mildness unknown in the same latitude on the Atlantic side; then the vegetable products, so far as known chief among which are forests of pine and fir waiting for the axe; then the mineral products among which are coal and copper, if not iron, silver, lead, and gold, besides the two great products of New England "granite and ice"; then the furs including precious skins of the black fox and sea-otter, which originally tempted the settlement, and have remained to this day the exclusive object of pursuit; and lastly, the fisheries, which, in waters superabundant with animal life beyond any of the globe, seem to promise a new commerce to the country. All these I have presented plainly and impartially exhibiting my authorities as I proceeded. I have done little more than hold the scales. If these have inclined on either side it is because reason or testimony on that side was the weightier.

I ask for no stronger testimony in refutation of the allegation that the principal thing that influenced the United States in paying the 7,000,000 of dollars was the fur industry, than that passage from Mr. Sumner, who was advocating the purchase before Congress; and to any impartial mind—I lay stress on the observation and I ask criticism upon it—is it not clear that Mr Sumner was expatiating upon the fisheries, upon the mineral products, upon timber, upon trade and commerce and, if you like, upon trade in sea-otter and the other animals mentioned, the black fox, and things of that kind? No candid statesman, as Mr. Sumner was, if he meant to say "You are to pay $7,000,000, because the seals from these little dots of Pribiloff Islands are worth it all"—if that had been the main inducement, would have left it out. I was only induced to follow this up, because of the somewhat extravagant allegations in the Case and Counter Case of the United States. I say, let the United States have the benefit of it, only do not let them parade before the Tribunal that they are being deprived of anything for which they paid so many dollars.

Mr. Justice HARLAN.—On page 79 of that document you will see Mr. Sumner goes into details of all the other kinds of animals, stating, among other things: "That from 1787 to 1817 for only a part of which time the Company existed, this Unalaska district yielded upwards of 2,500,000 seal skins". Near the top of page 81, you see he does refer to the seals.

Sir RICHARD WEBSTER.—I never said the contrary.

Mr. Justice HARLAN.—I know.

Sir RICHARD WEBSTER.—My point is that neither the value to Russia, nor the value to the United States of that trade or industry, is suggested or referred to. The fact of that strengthens my point. If I might be permitted simply to argue what seems to me to be the fair result of what you have been good enough to put to me, it strengthens my point; it shows that the knowledge of the capture of those seals was in the mind of Mr. Sumner, whatever extent it was, but that as an element of value to the United States it is not enumerated when he is speaking in a summary of what the objects of value were. I might say that the Foreign Committee about which Senator Morgan asked, seems to have been the Foreign Committee of the House of Representatives *in 1876.*

Senator MORGAN.—I am asking this question for information—does the evidence anywhere show that, at the time, a fishery of any description—either a whale fishery or what we call a fur-seal fishery had been established in Behring Sea—a cod fishery or halibut fishery?

Sir RICHARD WEBSTER.—According to my recollection of the evidence I do not think fisheries had been established, but large quantities of cod and halibut had been caught.

Senator MORGAN.—In Behring Sea?

Sir RICHARD WEBSTER.—In Behring Sea, but not a fishery established in that sense that I know of—vessels going there to fish.

I know of persons catching in Behring Sea large quantities of cod and large quantities of cod close to the Pribilof Islands—that is a matter which I will call attention to when I come to address the Tribunal on the matter of Regulations, but it is nothing to do with my particular point. I believe, Senator as far as my present knowledge goes—I speak subject to correction—there is no evidence of the establishment of what I may call regular trading fisheries of either cod or halibut, in the waters in question.

The PRESIDENT.—You are not aware of any fishermen having claimed against the existence of these fish-devouring animals, the seals?

Sir RICHARD WEBSTER.—I do not think, beyond the objection made by the Board of Trade of the town, and the important town to which we directed and were happy enough to be enabled to direct the attention of Mr. Phelps,—beyond that particular reference to the town of Port Townsend—

Mr. PHELPS.—Port Townsend.

Sir RICHARD WEBSTER.—Port Townsend—I will not attempt to follow it up, because Mr. Justice Harlan did not want in any way to do otherwise than to see that my argument was not stated in too strong language, but certainly the reference to furs in page 77 speaks of them as having, "at times vied with minerals in value, although the supply is more limited and less permanent". I cannot help thinking it was a very doubtful element of value—certainly it was not represented an element of value in any document that I am aware of.

Now Mr. President, I cannot forbear reminding you, once more, of the position that the committee took up in the year 1888 following out the line which was then the case of the United States, namely, that it was taken for granted that by the purchase of Alaska the United States would acquire exclusive ownership and jurisdiction over Behring Sea. Had they any warrant for saying that was taken for granted? Would the Tribunal kindly oblige me by looking at page 100 of the British Case where, at the very first inception of this matter, before we knew anything that the United States would say except what appeared in the diplomatic correspondence, we pointed out the impossibility of contending that the waters of the Behring Sea were *mare clausum;* and strangely enough to a certain extent, although not directly, it answers Senator Morgan. Mr. Sumner referring to whale fishery said:

> The narwhale with his two long tusks of ivory, out of which was made the famous throne of the early Danish kings, belongs to the Frozen Ocean; but he, too, strays into the straits below. As no sea is now *mare clausum*, all these may be pursued by a ship under any flag, except directly on the coast and within its territorial limit. And yet it seems as if the possession of this coast as a commercial base necessarily give to its people peculiar advantages in this pursuit.

Perfectly true, Mr. President, as was pointed out in connection with the subject by my learned leader, the Attorney General, when he was pointing out that it was because the possession of the coast in prox-

imity to the fishing with facilities of going and returning, in obtaining food, drying fish and a variety of other things, enables the inhabitants to exercise to a greater extent the privilege that all others enjoyed—that, as Mr. Sumner put it with prudence and judgement—

The possession of this coast as a commercial base must necessarily give to its people peculiar advantages in this dispute.

Then Mr. Washburn, of Wisconsin, spoke in this debate—this is the evidence upon which it is supposed to be taken for granted that it was *mare clausum*—Mr. Washburn said:

But, Sir, there has never been a day since Vitus Behring sighted that coast until the present when the people of all nations have not been allowed to fish there, and to cure fish so far as they can be cured in a country where they have only from forty-five to sixty pleasant days in the whole year.

Then Mr. Ferries, speaking in 1868, said:

That extensive fishing banks exist in these northern seas is quite certain; but what exclusive title do we get to them? They are said to be far out at sea, and nowhere within 3 marine leagues of the islands or main shore.

Then Mr. Peters refers to this and says:

I believe that all the evidence upon the subject proves the proposition of Alaska's worthlessness to be true. Of course, I would not deny that her cod fisheries, if she has them, would be somewhat valuable; but it seems doubtful if fish can find sun enough to be cured on her shores, and if even that is so, my friend from Wisconsin (Mr. Washburn) shows pretty conclusively that in existing treaties we had that right already.

Then occurs a long reference to Mr. Williams which I do not desire to read, because it is only on the same point. But perhaps I had better read the first passage. It is this:

Or is it the larger tenants of the ocean, the more gigantic game, from the whale, and seal, and walrus, down to the halibut and cod, of which it is intended to open the pursuit to the adventurous fishermen of the Atlantic coast, who are there already in a domain that is free to all?

Here, Mr. President, was the time when, if it were true that the motive to be urged upon a reluctant House of Representatives to vote the money was the value of the fur-seal fisheries, and the closed nature of the waters, we should have found the counter-reply. We have nothing of the kind; and I leave this branch of the case with the submission to this Tribunal that neither in law, nor in equity, nor in justice in the higher sense of the word, have the United States people ever acquired from Russia any rights which they are entitled to exercise now, to the exclusion of Great Britain, France, Japan, Russia, and all other countries that choose to send a ship there hunting and fishing for seals upon the high seas; and that the same law with regard to those animals on the high seas, in so far as we are dealing with the first four questions, applies equally in the case of whales, seals, walruses, cod, and numbers of other fish, well-known to my friends, which can be caught, and probably will be caught, in increasing numbers in these waters as the demands of population and the increase of civilization by that cause creates a market for them, and facilities increase for transit of the products when they once have been taken from the deep itself.

I ask the Tribunal now to permit me, at some little length I am afraid, to deal with the contentions of my learned friends Mr. Carter and Mr. Phelps, supplemented by that of Mr. Coudert, on the question of property.

Mr. Justice HARLAN.—Before you go to that new point, Sir Richard, let me make an enquiry about some documents. You are so familiar

ith them, that I know you can readily answer me. You remember he two drafts that passed between Great Britain and Russia in respect f the Treaty of 1825?

Sir RICHARD WEBSTER.—You mean the *projet* and the *contre-projet?*

Mr. Justice HARLAN.—Yes. It appears from the letter on page 72 vol. II. Appendix to Brit. Case), of December the 8th, 1824, from Mr. George Canning that, he sent to Mr. Stratford Canning an amended *rojet;* that is one showing such additions and alterations as he would onsent to for the guidance of the British Minister at St. Petersburgh.

Sir RICHARD WEBSTER.—You meant, that Mr. George Canning sent t to Mr. Stratford Canning?

Mr. Justice HARLAN.—Yes; and he had that third *projet* of the Brit- sh Government in his hands when he concluded the Treaty. I want o enquire if that document appears in the case?

Sir RICHARD WEBSTER.—Well, I do not think he had it in his hands hen he concluded the Treaty, though of course he had it. It is clear he first two Articles were taken from the American Treaty, as I men- oned to you yesterday.

Mr. Justice HARLAN.—On page 79, Mr. Stratford Canning writes to Ir. George Canning showing that he had presented this new *projet* to he Russian Minister, and some discussion arose about it.

Sir RICHARD WEBSTER.—I have never seen it, and I do not think hat that third document, as you very properly called it, being a modi- cation of the Russian *projet*, appears in the papers. We have no eans of access to anything else except what is here.

General FOSTER.—I would like to suggest that my attention was not rought to that reference till it was too late, under the Treaty, to make n application for it.

Sir RICHARD WEBSTER.—If General Foster desires the document, nd it is in our possession, he shall have it. We have never raised any uestion of time; and I may be allowed to say that General Foster has ever asked for the document, or expressed a wish to have it, though here are other documents that he has had quite independently of any uestion of time. Of course, I make no grievance about it; but if eneral Foster says he would like it looked for, it shall be looked for. Ly answer to the Judge was that I did not think it was in the papers. have never seen it; and, more than that, my attention has not been alled to it till this moment.

Mr. Justice HARLAN.—I followed your argument yesterday very losely, and I took these papers home last night, and studied them arefully, and my attention was called to it then for the first time. hat was the reason I asked the question.

General FOSTER.—I now express a most earnest desire to see it.

Sir RICHARD WEBSTER.—If General Foster had given us the slight- st indication, we should have endeavoured to get it.

Mr. Tupper informs me that a search was made, and it could not be ound. As far as I am concerned, I should be only too glad to have it, ecause I know nothing more than what appears in the papers now.

The PRESIDENT.—It may be in the Foreign Office in London or in t. Petersburgh.

Sir RICHARD WEBSTER.—I will make a further enquiry about it. s far as I know, it can only support the contention I urge before you. Ir. Tupper had better state to the Tribunal himself what he knows bout it.

The PRESIDENT.—Certainly.

Mr. TUPPER.—I may say, Mr. President, that that document seemed to me to be of importance; and, during the preparation of the Case, I made enquiries at the Foreign Office in London. A search was made there, and, if my memory serves me right, and my memory is confirmed for the moment by Mr. Maxwell of the British Staff here, an enquiry was also made at St. Petersburgh for the same document; but our efforts were unsuccessful.

Sir RICHARD WEBSTER.—We have conducted this case hitherto on perfectly friendly terms; and I hope the Tribunal will understand that the interruption by General Foster, which is quite fair enough, that he would like to see this document was the first intimation, as far as we know, of his having a wish on the matter. We should, of course, if we had had it, have had the document with our papers.

Mr. Justice HARLAN.—Then, on page 41 of the same volume, referring to the settlement of Sitka before the Treaty, Sir Charles Bagot says it,

> is not laid down very precisely in the map published in 1802 in the Quartermaster-General's Department here, or laid down at all in that of Arrowsmith, which has been furnished to me from the Foreign Office.

I find, among the maps, a copy of this map of 1802, and I wanted to enquire if a copy of the map of Arrowsmith is in the case anywhere? I see from your list, there was one of Arrowsmith.

Sir RICHARD WEBSTER.—I referred to it yesterday.

Mr. Justice HARLAN.—It was published in 1822 with additions to 1823. That is the map numbered 98; and I wanted to know if a copy of it was in the case. It is referred to on page 100 of the British Counter Case, Volume 1, map N° 98.

Sir RICHARD WEBSTER.—If you would look at page 96, you will find Arrowsmith's Chart of the Pacific Ocean, originally published in 1798 with corrections to 1810. That I know we have; I should think it was the same map.

Mr. Justice HARLAN.—That was published in 1810.

Sir RICHARD WEBSTER.—Originally published in 1798.

Mr. Justice HARLAN.—But I suppose, from the language of Sir Charles Bagot, the map he refers to is the one of 1822 with additions to 1823.

Sir RICHARD WEBSTER.—Where does Sir Charles Bagot refer to it, Sir? On page 41, he refers to the one of 1802.

Mr. Justice HARLAN.—That is the Quartermaster-General's map that you furnished.

> It is not laid down there (that is, the map published in 1802) in the Quartermaster-General's Department here, or laid down at all in that of Arrowsmith, which has been furnished to me from the Foreign Office.

I suppose that is the British Foreign Office?

Sir RICHARD WEBSTER.—I should think so.

Mr. Justice HARLAN.—And the map in your list nearest to that date is one of 1822 with additions to 1823. It is N° 98.

Sir RICHARD WEBSTER.—I should have doubted if that was it. It was a map of America. I should have thought it was more likely to be the map of the Pacific Ocean.

Mr. Justice HARLAN.—There are a large number of maps,—there is one of Arrowsmith in 1802; one in 1804, and one in 1809, and one in 1811,—reading from your list.

Sir RICHARD WEBSTER.—You see this map was sent by the Foreign Office to Sir Charles Bagot at St. Petersburgh. We have not been

ıle to find it at the Foreign Office; and it by no means follows that it ould have come back. We should only have such papers as he sent ıck.

Mr. Justice HARLAN.—Would it be in the British Museum?

Mr. TUPPER.—No, this was not. We were unable to identify it.

Mr. Justice HARLAN.—From what source was that memorandum ıtained on page 100, N° 98? You give there a list of maps.

Sir RICHARD WEBSTER.—That I have no doubt can be obtained.

Mr. Justice HARLAN.—That is the one I am enquiring about.

Sir RICHARD WEBSTER.—But there is nothing to identify it with ıe map referred to in Sir Charles Bagot's letter.

Mr. Justice HARLAN.—No; but it is the one in your list nearest to the ıte of his letter; that is all. There is one there of 1818; and those aps together might be of some value.

Sir RICHARD WEBSTER.—It seems to me, but it is entirely for you ı say, there are many other Arrowsmith's maps that would quite as early correspond. The coincidence of the date is a very small matter ıdeed; because the one you referred to of 1798 has additions up to 1823. his letter was written in August, 1823; and it by no means follows ıat the publication was before this letter. I only submit it for your ıdgment. After all, it is very untrustworthy. It is corrected up to 823, but that may be the end of 1823.

Mr. Justice HARLAN.—And it may be the map of 1818 of Asia by ırrowsmith.

Sir RICHARD WEBSTER.—Or the large Chart of the Pacific Ocean, ° 40, published in 1810. You know that when these corrections come ome, they have to be plotted out and printed, and it by no means fol- ıws that corrections to 1823 would be published in that year; more robably, it would not be so.

Mr. Justice HARLAN.—You may be right about that.

Sir RICHARD WEBSTER.—Anyhow, I am not able to give you further ssistance.

The PRESIDENT.—If that map of 1822 was used, would it not be in our favour?

Sir RICHARD WEBSTER.—I was not considering the effect of my nswer one way or the other; I was endeavouring to give the Judge the ıformation he wanted. I do not think my argument depends on any articular map; but I trust I made clear to the Tribunal yesterday that etween the Contracting Parties there was no doubt about what they eant either by reference to "Pacific Ocean" or "North-west coast."

When Mr. Justice Harlan was good enough to put those questions to e, I was passing on the 5th question in the Treaty, and I will indicate ı the Tribunal the course I propose to adopt. I propose to examine r. Carter's and Mr. Phelps's argument with reference to the question the right of property. I propose to examine Mr. Phelps's argument ı to the right of protection, for he has more pointedly dealt with that atter—though it is quite fair to Mr. Carter to say that he has used rguments in his able speech incorporating the main features of Mr. helps's argument; and therefore I do not consider that there is any istinction between Mr. Carter and Mr. Phelps in that respect. Then should propose to say a word or two on a suggestion which fell from enator Morgan, and which has arisen incidentally more than once in ıe course of this discussion as to what the function of this Tribunal ı in answering Question 5.

There are minor differences between Mr. Phelps and Mr. Carter as to hether the United States have got the right to kill all the seals on

the islands to which I am not going to refer further. I leave that very interesting subject of discussion for the next occasion when Mr. Phelps or Mr. Carter in the United States or in England, as I hope, meet on some platform where political economy and the abstract question as to the rights of property are being discussed: and I shall relegate to that occasion the question whether property is robbery, and whether the rights of the United States and of Great Britain to dispossess natives of their territory and to possess themselves of it, is the exercise of a legal right, or is a development of that principle which, years ago would have been called the force of arms. My learned friend Mr. Carter has kindly taken under his wing and protection all the various acts, not altogether justifiable, which have been done by Great Britain and by the United States in the past and reduced them all to a philosophic basis. It seems to me, if I were to endeavour to follow him, I should soon get out of my depth, and I am certain that I should not assist this Tribunal. Therefore, I will confine myself to the legal aspect of these questions.

Sir, my learned friend Mr. Carter, turned from the four questions, after a considerable discussion upon them, with a sense of relief, and he said, on page 364 of the report of his speech,—

> I approach with satisfaction a stage of this debate where I have an opportunity for the first time of putting the claims of the United States upon a basis which I feel to be impregnable. I mean the basis of a property interest. Now the United States asserted a property interest connected with these seals in two forms which, although they approach each other quite closely, and to a very considerable extent depend on the same evidence and the same consideration, are yet so far distinct and separate as to deserve a separate treatment.

And then he discussed the question of property in the seals and property in a seal "herd".

Mr. President, the traditions of my profession prevent me from being able to say that any answer which I can give to this proposition places Great Britain in an impregnable position, but I hope, as I said yesterday, that my arguments will not receive less attention or less consideration from this Tribunal if I abstain from endorsing them by personal opinions; I may in the heat of the moment be misled into using expressions which would look as though I was referring to my personal opinion, one cannot avoid doing so particularly in answer to questions put by the Tribunal, but I hope they will understand that I submit my argument to their judgment without craving any additional weight from the fact that I may be of opinion that my position is impregnable or the reverse. I mention that because otherwise those who may be good enough to read my argument may think that because I do not express personal opinions or personal belief in the merits of my case, therefore the case is entitled to less consideration, or my argument to less respect.

Now the proposition has been stated by my learned friend Mr. Carter many times over and pretty much in the same language; and it is only necessary for me to give one citation for the purpose of reminding you of that to which I am about to address myself. He said (the particular reference is at page 464 of the report before you):

> Wherever an animal although commonly designated as wild, voluntarily subjects itself to human power to such an extent as to enable a particular man or a particular nation to deal with that animal so as to take its annual increase and, at the same time, to preserve the stock, it is the subject of property.

You will remember, Mr. President, that in an argument extending over a very considerable time, my learned friend the Attorney General dealt with that argument—and I could not with advantage supplement *what he said* by any detailed examination of the main principles on

ch it is based. He pointed out that in the sense of subjection by the s to the control of man, in the sense of the same voluntary subjection ch takes place when the tame horse or tame pig or any other animal hat kind which may have been originally wild comes, and with dumb guage, if I may use such an expression, asks to be fed or to be let its stable—he pointed out that in that sense there was no subjec- by the seal to the control of man and he pointed out further that doctrine that property depended upon a particular individual being to take the annual increase must be ill-founded, for otherwise it ld have given a claim to property in many cases, if not in every , in which the law of all civilized countries has rejected it. I do propose to follow my learned friend, the Attorney General, in detail those arguments.

le further struck, I submit with effect and successfully, at that ch my learned friends Mr. Phelps and Mr. Carter have assumed to so clear, that no argument was desired to support it and any com- hension could retain it: namely that a property in the seal "herd", listinct from a property in each individual seal, was clear and intel- ble, so that no demonstration or proof were necessary in support of h a contention. I may be permitted only in a single sentence to say t I have been—it may be the fault of my intelligence—unable to lerstand how, if there is no property in the individual seal, there be a property in the aggregate of individual seals which forms the erd". Upon none of these points, though they occupy a very impor- t portion of my learned friend Mr. Carter's argument, and of the orney General's reply, do I feel it necessary to trouble this Tribunal h a lengthened argument. I have indicated sufficiently, my concur- ce in the view which the Attorney General presented to the Tribunal. t I now come to that which in my submission is the vice which lies the root of the argument written and oral, on behalf of the United tes, a vice, I humbly submit, which, the moment it is recognised l appreciated. destroys to a large extent the value of the contention respect of property. That vice is this, that the United States are ble, so far as their argument discloses it to us, to see any difference ween the right which a man has to kill wild animals when they pen to come upon his land, and the right of property in the animal ether it is on the man's land or not. Over and over again in the rse of the interesting argument of my learned friend Mr. Coudert, eved as it was, as you Mr. President pointed out, by brightness in ny points, he stated this proposition, and said it was so self-evident so convincing by its mere enunciation that he would wait till the er side were heard; in fact, he treated it as an admission by us. I ld refer to many passages; for instance at the very beginning of his ech—I refer to page 554—he said:

> ow to start from a point that is certain, to reach one that may be certain, have any rights of property at all as to the seals? Here, fortunately, we all concede we have, and it is said that upon the islands these are as much our property as igh they were sheep or calves.
>
> r CHARLES RUSSELL.—Certainly not.
>
> r. COUDERT.—Certainly not?
>
> r CHARLES RUSSELL.—Certainly not.
>
> r. COUDERT.—Well, I gave you credit, and I will take it back. I supposed that n we held the seal in our hand—I supposed when we slit its ear—I supposed that n we could put a brand upon it, that it was our own, as much as it was if it a sheep or ewe. Where it comes in I am absolutely incompetent to say. I e read the argument on the other side with interest, and I supposed that it was eded that upon our land, in our hands, under our flag, in our waters, they were bsolutely our property, as *that* book is mine.

He was holding up the book from which he was conducting his argument. Sir, it is not saying too much to point out that this proposition, stated over and over again by Mr. Coudert, stated also, though not so positively I admit, by Mr. Carter; because Mr. Carter did refer to the distinction between the right of killing *ratione soli*, and the right of property—I say that that proposition, stated over and over again by my learned friend Mr. Coudert as being so plain as not to require argument, is radically unsound.

My learned friend, Mr. Phelps, in his written argument at page 132 states it, I admit, not quite so distinctly as Mr. Coudert, but still in all probability meaning to maintain the same proposition. This passage occurs—in his Argument having the same meaning, at page 132:

> The complete right of property in the Government, while the animals are upon the shore or within the cannon-shot range which marks the limit of territorial waters cannot be denied.

Of course, if my learned friend, Mr. Phelps was then putting compendiously that which other writers have put, that the exclusive right of killing wild animals upon your own land gives you a qualified right of property *ratione soli*, meaning thereby an exclusive right to kill—if that is all Mr. Phelps meant, there is no necessity to discuss it any more; but if the proposition is of any value at all it means this, that the wild animals, so long as they happen to be on the Pribilof Islands or in territorial waters are the property of the United States; and they cannot draw any distinction between the United States and the lessees, and therefore for this purpose they mean to allege that they are the property of the lessees, that they have the right of killing them, and they alone can exercise this right of killing, hunting, or shooting, or whatever it may be.

Senator MORGAN.—As to the lessees, they cannot have a property in any of the seals except such as they kill.

Sir RICHARD WEBSTER.—I contend that.

Senator MORGAN.—The United States possess the right to all the seals, and that gives them the privilege of killing some.

Sir RICHARD WEBSTER.—I must be permitted to reserve my statement, because I could not assent to that statement or allow it to pass as being supposed that I agree the United States have the right of property in these seals, because I contend most distinctly they have not.

Senator MORGAN.—I meant to characterize it as the assertion of the other side. It is not even an expression of my own opinion.

Sir RICHARD WEBSTER.—Yes, but as I read the legislation of the United States, it does not claim the property in these wild animals. I agree with an observation which fell from Lord Hannen. He was desiring to keep us close to the point when he asked Sir Charles Russell, whether it would make any difference for the purpose of this discussion, if the United States Statute purported to give right of property in these seals. It would make no difference; and I will not argue any false point, but I must not be understood by my learned friend as conceding that in construing those Statutes of the United States as between the Government and the lessees, or as between the Government and a trespasser, they would have been able to lay the property (to use a technical expression) in the United States. In two sentences I will state my view. By the earliest legislation, the United States created the Islands a Government reserve, not unknown in other parts of America, not unknown in Canada: they reserved the Islands, and that enabled the United States to grant licenses and to prevent other people going to utilize those islands, or dealing with them in any way, except

rith the permission of the Government of the United States. And s to wild animals, as the King, according to English law in years gone y, in certain royal forests and royal parks could restrain people from illing game, so the United States could restrain the citizens of the Jnited States from killing or catching anything or even from working ny minerals upon the Pribilof Islands, as they were a Government eserve.

But the lawyers who framed those Statutes had too much knowledge f law to endeavour to claim, even for the Government, property in eals. If they have the property in seals they have the property in irds, they have the property in fish which live in the waters, they have he property in cod which come into the territorial waters. It is not a uestion of seals only; the United States by its legislation, written in he English language, as far as we can understand that legislation, oes not even purport to claim the property in the wild animal.

Mr. Justice HARLAN.—What in your judgment could the United tates have done by statute which would have been regarded by you s an assertion of right and property.

Sir RICHARD WEBSTER.—They could have said that, as between hemselves and their citizens, the property in all the game, and in all he seals if you like in the Pribilof Islands, should be vested in a public fficial or should be vested in the State. If they had said that, the esult would be, if the seals were killed, proceedings might be taken y the United States for the value of the body, and a penalty might be nflicted.

Lord HANNEN.—Some people have asked that the property in game hould be given to the land owner.

Sir RICHARD WEBSTER.—Yes, and I would point out according to ur game laws, as they have now existed for centuries there is no round for the suggestion that the property in game is in the Crown—hatever may have been the origin of the Game laws, there has not een for years any foundation for that suggestion.

But, Mr. President, having made my respectful protest, let me say o the members of the Tribunal, while I am supposed to concede that ven as between a citizen of the United States and the Government of he United States the property of the seals may be in the Government, equally admit that from the point in view that we are considering it absolutely immaterial, because we are dealing with the right to capure and take these animals and the property in these animals when hey are upon the high seas.

I go back to the point which I was considering when the question as put to me and I repeat that so far as I know, the law of no civilzed nation has given the property in wild animals to the owner of the oil on the ground that those wild animals are temporarily upon the oil, being found here to-day and there to-morrow. I have examined rith care the law of the United States. I have examined with care the aw of Great Britain, and refreshed my memory upon it, in so far as I nay have forgotten points which I ought to know. I have examined s thoroughly and exhaustively as I could the French law; and I have laced at the disposal of my learned friend Mr. Phelps the full text of he report upon the French law by a gentleman of great learning and minence, Maître Clunet, obtained in case my own research in these natters should not be sufficient, I say—speaking subject to correction y the President,—that there is not the shadow of a pretence of saying hat by the law of France the property in wild animals is given to the wner of the soil simply because they happen to be there; that in the

French law as in the law of all other civilized countries that I know of, it is merely a right to kill, and the right to property in them never arises until possession is taken by killing. Sir, I must not speak with too great confidence of the laws of other countries; but of course it is only for the purpose of analogy that they are of service or of interest to this Tribunal. But perhaps I may be allowed to say that I am not aware of the law of any country, in which the law has been reduced either to a code or is in such an advanced condition that it can be summarized by text writers, or be referred to or appear in reported cases, that gives at the present time the property in wild animals simply by virtue of the possession of the soil on which they happen to be found. And I cannot help thinking that it was a little bold of my learned friend Mr. Coudert to start with the suggestion that he gave us credit for the admission that we should concede that seals upon the Pribilof Islands, in the territorial waters of the Pribilof Islands, and under the flag of the United States, whatever that may mean—that on the territory and in those waters we should concede that they were the property of the United States just as much as the book which he held in his hand was his property.

Sir, there is no distinction for this purpose, for the purpose of the principles that we are applying, between nations and individuals. I ought perhaps to say that my learned friends Mr. Carter and Mr. Phelps, and I think Mr. Coudert too, did not suggest that there was any distinction. They say actually in writing, at page 44 of the United States Argument, that the principles of municipal law may be invoked for the purpose of considering this right of property, and Mr. Carter said, that from the point of view in which he was considering this question of property, it was the same between nations as between individuals. It could scarcely be contradicted, because the Government of the United States must be taken to be an individual for this purpose. If the property were allowed in the Government, the nation would be itself an aggregation of individuals. So in the same way the various subjects of Great Britain would be able to claim property upon this principle as between one another. It is put very pointedly indeed at page 44 in the following passage.

> And the municipal jurisprudence of all nations proceeding upon the law of nature, is everywhere in substantial accord upon the question what things are the subject of property.

Therefore it is not in anyway misrepresenting the position of my learned friend Mr. Phelps if I indicate that they do not base their case upon any different principles, as applicable to nations, from those which they would apply in the case of individuals.

Now, Mr. President, what is the law as between individuals? Is it the law that the presence on a piece of land of a wild animal gives the property to the owner of the land while it is there? Sir Charles Russell read from the United States authorities; and I am in this position, that unless my learned friend Mr. Phelps was right in saying that one American Judge (I think he was Mr. Justice Nelson) in one case where he was dealing with bees, thought that the presence of the bees in the tree—not *hived*, but in the tree—would give the owner of the tree the property in the bees: unless that Judge did in fact express that opinion, there is not a single authority for my learned friend's contention—not a single one. I suggested at the time to my learned friend the Attorney General,—and Mr. Carter for the moment expressed accord with the view that we were suggesting—that the learned Judge did

ot mean to decide anything of the kind, and that that point was not fore him; and when the whole of his judgment was examined, we bmit it is plain that that learned Judge was laying down no differ- it rule at all, but was simply referring to the doctrine of property *tione soli*, i. e. the power to take that which was upon certain territory land for the time being.

Therefore, Mr. President, what is our position to-day in regard to is matter? The question is the same between Great Britain and the nited States as it might be between two owners of the Pribilof Islands, it might be between the owner of the island of St. Paul and the vner of the island of St. George. It is a pure accident, for the pur- se of the matter we are considering, that both those islands happen belong to the United States. They might have been on one side or e other of that imaginary line which is drawn through the sea in der to divide the territory of Russia from that of the United States; d so far as any knowledge in the minds of the United States nego- ators at that time was concerned, there might have been seal islands close to each other as St. Paul and St. George on either side of the e, or those two islands themselves might have been on either side of at imaginary line. Let us, just for a moment, and only for a moment, st the case in that position. The St. Paul islander might say that the als bred upon his island came back to his island, and that while they ere on his island he could prevent anybody from killing them, he could event anybody from coming and hunting them; and the same would ply to the waters within which he was supposed to have exclusive minion. I am in this position, Sir:—That so far as the main fallacy hich I submit underlies the written and oral arguments of my learned iends is concerned, there is not an authority or a vestige of authority, eyond that to which I have made passing reference and, which has en, I submit, misunderstood,) which has laid down a different propo- tion. There is not a vestige of authority with which I have to con- nd. On the contrary they are all in my favor. But my learned iends, knowing the extreme difficulty of their position, adduce in their d a doctrine which is well recognized as giving what is called, not an solute property, but a qualified property: and may I be permitted to y, Sir, a doctrine which, if mere presence upon the islands had been fficient to give the absolute title, would have been wholly unneces- ry; because I agree in the view presented by some members of the ibunal that if there be absolute property in a thing, that property llows the thing where it goes, and does not depend upon geograph- al bounds at all. My learned friends being pressed by the difficulties their position, invoke what is called *animus revertendi*.

The PRESIDENT.—Sir Richard, I beg to observe that, even admitting e statute law of the United States was to attribute property, as Lord annen justly observed, some people attribute to it, in the game or e fish or the birds, in any definite part of the territory of the United ates, it would not be implied that other nations would acknowledge at property anywhere.

Sir RICHARD WEBSTER.—That, of course, Mr. President, is *a fortiori* instance of what I was saying, and we must gross injustice to the lawyers of the United States if we assume, at in disregard of this consideration they have framed their statutes claiming property in these wild animals, not only while they are on nd and in territorial waters, but when they are to be found in any rt of the high sea. I do not wish to go back upon that, because I not think it is fair or just to impute such a meaning to the framers

of those statutes when it is not to be gathered from the statutes themselves. But, Sir, it is sufficient for my purpose to point out with reference to the observation you have made that when we refer to the principles upon which the law of property in the United States, Great Britain, and other civilized nations is based, we do not find any authority for the suggestion that the presence of the animal upon the land or within territorial waters gives anything more than a greater right and opportunity of killing, because you can keep other people from coming there. It does not increase your property in the animal one iota. It is equally so whether the animal has an *animus revertendi* or whether it has not. If you can catch it there, you can take possession of it, and when you have taken possession of it, it is your property, and not till then, and only as long as you can keep it in your possession and no longer.

Now, Sir, when you were good enough to indicate that you were following what I ventured to put before you, by making that observation, I was pointing out that, feeling their position, they claimed to have this property by what they are pleased to call an application of the doctrine of *animus revertendi*.

Senator MORGAN.—Do you contend that the United States Government, Sir Richard, have not forbidden its citizens to acquire the private ownership of fur-seals on the islands?

Sir RICHARD WEBSTER.—I think the United States has permitted its citizens to acquire private ownership with their license.

Senator MORGAN.—The lessees you mean?

Sir RICHARD WEBSTER.—The lessees; yes, Sir.

Senator MORGAN.—I am speaking of private citizens that are not lessees.

Sir RICHARD WEBSTER.—Only because they have not got the right to go there. That is all.

Senator MORGAN.—I am speaking of private citizens who have the right to go there?

Sir RICHARD WEBSTER.—Certainly. Only because the Government had said that: "None of our citizens shall kill seals on the Pribilof Islands except with our leave."

They have not altered the law of property at all. The lessee has no property in those seals until he has killed them. Mr. Senator, I address you as a lawyer upon this matter, and I ask you to consider my argument simply and solely in that position; and I submit to you that the lessee has no property in anyone of those seals until he has killed it, and that the law of the United States has not given that lessee any property in the seal until it is killed.

Senator MORGAN.—I should suppose he would have property in the seal from the time he commenced driving it to the shambles to be killed.

Sir RICHARD WEBSTER.—I beg your pardon. He has no property until he has succeeded in capturing it. I admit that he would have evinced the intention of taking possession of it, just in the same way as when I point my gun at a wild pheasant or a wild duck I evince my intention of shooting it if I can, and of taking possession of it and making it my own; but I may miss with the gun, and the man may not succeed in driving the seal to the place where he can knock it upon the head. It is not the intention to drive that seal that gives property.

Senator MORGAN.—What becomes, then, of the part of the statutes that prohibits hunting by citizens of the United States.

Sir RICHARD WEBSTER.—That has the effect of saying that nobody else may go there and try to take possession.

Senator MORGAN.—I mean outside the three mile limit, anywhere in Behring Sea?

Sir RICHARD WEBSTER.—That is simply and solely that the United States has said that in the interest of its revenue it will prevent its citizens from killing seals—I mean assuming that to be the construction; of course I do not want to argue again that was not the original construction—but assume that there was a statute that no person should kill any seal in Behring Sea east of that line in distinct terms, in so many words: the result of that would be not that the United States would claim any property, not that the United States statute would give any property, but that in the interest of itself, of its lessees, of any person who desired ultimately to kill seals on the islands and reduce them into possession, the United States thought fit to make that game law.

Senator MORGAN.—But would it not be entirely clear that the person who should kill seals in Behring Sea outside the three mile limit, he being a citizen of the United States, could not acquire any property in that animal?

Sir RICHARD WEBSTER.—It would not be so at all, Senator. That would be entirely dependent upon whether or not by the United States law the property in game killed by a person unlawfully did or did not remain in him—a perfectly academic question, from the point of view we are considering. I really do not know, I never have inquired, whether by the United States law—if a man goes on to the land of a third person and unlawfully kills game, when that game is killed it belongs to the owner of the land upon which it falls or whether it belongs to the trespasser; but from the point of view which I am considering, it makes no difference, because no property is acquired by anybody until the thing is shot.

Mr. Justice HARLAN.—Game killed under those circumstances belongs to the owner of the land, I think, by our law.

Sir RICHARD WEBSTER.—That is the law of England, but I did not know whether any statute of the United States altered the law on that subject.

Mr. Justice HARLAN.—There is no statute on that subject.

Sir RICHARD WEBSTER.—I am much obliged, Sir. My answer to the Senator, and the answer upon which I am prepared to stand, is that there would be no property in anybody at all until that game was shot.

Senator MORGAN.—And that nobody in the United States had any property in them?

Sir RICHARD WEBSTER.—No; not in these seals.

Senator MORGAN.—Then how could anybody acquire property under such circumstances *ratione soli?*

Sir RICHARD WEBSTER.—It depends upon what you mean by *ratione soli*. *Ratione soli* is the privilege to kill. I will put the case to you, Sir. There was nothing to prevent the United States Government from saying: We will by law prohibit every one of our citizens from killing seals unless they take a license from the Government.

There is nothing to prevent it. That practice exists in England today. I cannot kill a partridge or I cannot kill certain wild birds on my own land even without the license of my Government. I presume—I do not really know—that the game laws of the United States are similar. I do not care for the purposes of my argument whether they are or not; but nobody has ever pretended that that license to kill gives a property in the game.

Senator MORGAN.—But it would prevent the property from being vested in you if you shot the game contrary to law.

Sir RICHARD WEBSTER.—I really do not know that; and for my purpose it is perfectly immaterial, because I do not care whether, when the animal is killed, it belongs to the United States, or belongs to a public officer, or belongs to me. My point, respectfully, Sir, is that until it is killed there is no property in anybody at all. It is absolutely immaterial to my argument whether when the animal is killed and taken possession of the property in the body is in the person who has killed it or in the person upon whose land it falls, or, if you like, in the Government. The whole point we are discussing to-day is,—Is there any property in the live animal before possession has been taken of it; and I do not perceive that any light is thrown upon that point by considering what technical rule applies as to the property in the animal when killed.

Senator MORGAN.—Then, as I understand you, the only way of acquiring property in the fur-seal is to kill it?

Sir RICHARD WEBSTER.—Unquestionably the only way of acquiring property in the fur-seal is to kill it.

Senator MORGAN.—That is what I meant.

Sir RICHARD WEBSTER.—I am not referring, Sir, if you please, to property in the islands that enables you to exclude other people.

The PRESIDENT.—You can take possession of a living fur-seal, I suppose.

Sir RICHARD WEBSTER.—Of course. I ought I suppose to have included that; but from the question of Senator Morgan I did not think he meant that.

Senator MORGAN.—I did not mean that.

Sir RICHARD WEBSTER.—Let me give the answer. Of course if you have a pond staked out on the shores of the Pribilof Islands and you drive the seals into that water and keep them there and feed them every day, as you would animals in a zoological garden, then they become *coarctatus*. They become restrained, and so long as you keep them there you can take them out and shoot them and catch them. You have reduced those seals into possession. You can possess a living seal as well as a dead one. But I was dealing with the case of a seal which was found at large, swimming, and I was answering the Senator with reference to the point he was putting to me, that of a free swimming seal in the high seas. Nobody can, according to the law as it stands to-day, obtain the property in that seal except by taking possession of the animal. That is my contention, and if I have not answered your question sufficiently to explain my meaning, I know you will indicate it to me.

Senator MORGAN.—That answers the question entirely, I think. You say there is no way of taking possession of the seal except by killing it.

Sir RICHARD WEBSTER.—It is always important, Mr. President, to be careful that a statement of that kind is exhaustive, and therefore I thank you for putting the question to me. I was excluding zoological gardens from my mind for the moment. Of course I admit that if you retain animals in the sense of keeping them inclosed in a pen, that is another method of obtaining possession of them and keeping them alive.

The PRESIDENT.—Yes; and not only one but several of them in a herd, I suppose?

Sir RICHARD WEBSTER.—Oh certainly; there is not the slightest difference.

The Tribunal thereupon adjourned for a short time.

The PRESIDENT.—Sir Richard, we are ready to hear you.

Sir RICHARD WEBSTER.—Mr. President, by an accident, and a very fortunate accident, I am able to answer, before I resume my argument Senator Morgan's question. Mr. Piggott (who was legal adviser to the Japanese Cabinet), happens to be here, and he happens to be able to give me, from his own knowledge, the references to the document that we happen to have in Hertslet, here, with reference to the action that Senator Morgan called attention to, in the year 1855. I am referring to Hertslet, Vol. X, p. 468. The actual convention is not set out—it is in an earlier volume—but in the year 1855 a convention was made between Great Britain and the Emperor of Japan which gave Great Britain the right to navigate a certain internal or inland sea—the one referred to by Senator Morgan, which I believe was, at one place, only a mile and three quarters or two miles wide—or something of that sort.

Senator MORGAN.—It is not a Sea—it is the Straits of Shimonoseki.

Sir RICHARD WEBSTER.—I merely used the expression "inland sea", because it will be found to be used in the original convention; but it makes no difference.

Lord HANNEN.—It is a passage from one large ocean to another.

Sir RICHARD WEBSTER.—Yes. The Japanese name is "Inland Sea".

The PRESIDENT.—Was that confined, to England, or did it include France and the United States?

Sir RICHARD WEBSTER.—I think, if I remember rightly, the United States subsequently joined in it.

Senator MORGAN.—You mean in the Treaty?

Sir RICHARD WEBSTER.—There are fourteen powers.

Senator MORGAN.—We had no part in the Treaty.

Sir RICHARD WEBSTER.—I will not say in the Treaty—I think it will turn out that the United States got (either by Treaty or by some other arrangement), the benefit of it; but for the purpose that I am dealing with it at the present moment, it makes no difference.

The PRESIDENT.—In 1865 was it?

Sir RICHARD WEBSTER.—1855.

The PRESIDENT.—That was the date of the Crimean war, and very likely concerned the English and French fleets.

Sir RICHARD WEBSTER.—Mr. Piggott tells me there were fifteen or sixteen Powers that had the same rights, and I thought that probably the United States were among them.

The PRESIDENT.—The same rights by Convention, of course?

Sir RICHARD WEBSTER.—Do not let that be taken from me, if the Senator says the United States had not.

Senator MORGAN.—I do not think they had—not to my recollection.

Sir RICHARD WEBSTER.—If the Senator says they had not, I will look it up; but from the point of view he was putting to me, it makes no difference.

Senator MORGAN.—Not at all.

Sir RICHARD WEBSTER.—Certain Powers, among others Great Britain, had got these rights by Treaty. In 1864 a Prince of the name of Choshiu—(I am referring now to the 12th volume of Hertslet p. 1145)—appears to have rebelled against the then Government of Japan and objected to this right of passage being exercised by foreigners, and, I believe, actually interfered with British ships in the course of their navigation, whereupon Great Britain, in conjunction with the United States, and with some other Powers, made an arrangement for coercive measures which they should take to restrain the rebellious

action of Choshiu which the Government of Japan was not able to restrain; and the action referred to by the learned Senator this morning, was the action taken by Great Britain to enforce their Treaty rights which existed by the convention of 1855. If the learned Senator tells me that the United States had not got similar Treaty rights, of course the argument would not apply; but I rather think it will be found, when the history is looked up, that they also had Treaty right.

Senator MORGAN.—We only had the privileges, I think, of the most favored nations.

Sir RICHARD WEBSTER.—That would answer it at once. One knows what the expression "favored nation", means,—that would give them, at once the same rights. But at this page 1145 the history of it is referred to. It will be found that the action was taken in 1864, pursuant to a Memorandum which I will read.

Memorandum delivered by the representatives of Great Britain, France, the United States, and the Netherlands, in Japan relative to the coercive measures to be adopted against the Prince of Chioshiu in the Straits of Shimonoseki, and elsewhere.

So that the state of things is this—not that Great Britain was in any way assuming to take any action against what I may call the *de facto* and proper Government of Japan, but that they found that their Treaty rights were being infringed by the action of a prince who was practically rebelling against the Government of Japan, and, thereupon they said to the Government of Japan: If you cannot put down this rebellious chief, we will help you to do it.

And the recitals which I have in the memorandum before me are distinct. The first paragraph is this:

When the Treaty Powers in 1862 consented, on the representations of the Tycoon's Envoys, to certain important modifications in the treaties; the spirit, the motives and the extent of these concessions were clearly set forth.

In consenting to the deferred opening of the ports, mentioned in the memorandum signed at the time, the Treaty Powers were careful to establish the fact that this postponement, far from signifying a virtual abandonment of their rights, was, on the contrary, to be taken as indicating their firm resolution to maintain them, by furnishing the Tycoon with the means which he declared to be necessary for securing them in a more effectual manner.

In a word, the Japanese Government by the very tenor of these representations, pledged itself to remove, in exchange for these temporary concessions, all the difficulties of the time, and the obstacles which might oppose the development of our relations.

But what have been the results of these promises and concessions?

The undersigned summed them up, when, last year in the month of July, they addressed to the Tycoon an identical note describing the restrictions placed upon commerce, the murderous assaults committed upon foreigners, the closing of the Inland Sea, and the attacks made upon foreign vessels by a Daimio:

That was the Prince of Choshiu, who was one of the Daimios, who had been attacking foreign vessels. The memorandum then proceeds.

The Tycoon, by treating with foreigners on a footing of equality, has hurt the national pride of the Daimios, while he has damaged their interests by reserving to himself the monopoly of the new commercial relations.

It then sets out the statement that a certain number of these Daimios had rebelled against the authority of the Government of Japan, taking, as the cause of their complaint, these Treaty arrangements which had been made by the Government with the various Powers which were thought to be inconsistent with the national dignity. I now read from page 1147:

The political situation of Japan might therefore be summed up as follows:

Weakness of the Tycoon and increasing powerlessness of that Prince to resist the violent pressure of a hostile majority.

Existence of a party favorable to continued relations with foreigners, but at this moment incapable of giving effect to its opinions.

Finally, armaments of every kind, prepared with the loudly avowed intention of expelling all foreigners from the country.

The position made for the Representative of Foreign Powers is the natural consequence of the situation and the tendencies which they have just pointed out.

The residence in the capital is virtually interdicted.

The passage through the Inland Sea is forbidden to their vessels, by means of batteries erected with that object.

Then there is a further reference to other restrictions under which foreigners were placed, and the memorandum proceeds in this way:

The recent decision of the Governments to which the demands on the part of the Japanese Mission now in Europe has given rise, enable the undersigned clearly to define their obligations. The foreign Powers not only reject in categorical terms the propositions regarding the abandonment of Yokohama, but also refuse, by anticipation, to listen to any overture for the modification of existing Treaties or curtailment of the rights they confer.

The instructions transmitted to the undersigned are identical. All are directed to maintain Treaty rights intact, and to insist on their complete observance.

Then follows a reference of how the Treaty rights had been exercised, most fairly, in the interests of the residents as well as of the foreigners; and then the memorandum says:

Whereas a more energetic attitude would, on the contrary, have undoubtedly, for immediate result, the dissipation of the idea now entertained by the daimios, that patience has only been dictated by weakness or fear.

A vigorous demonstration will disarrange schemes scarcely yet formed, and it is calculated to give support to the party favorable to the maintenance of Treaties before its opponents will have time to crush it. It will moreover give a salutary lesson to those semi-independent feudal chiefs who scoff at the obligations of Treaties, the validity of which they repudiate, and who for the justification of their continuous acts of violence appeal to a decree still in existence which makes foreigners outlaws.

In a word, this decided attitude may furnish to the Tycoon an occasion to regain an influence which is slipping from his weak hands, although he is far from willing to abdicate or renounce his governing powers. At all events it may compel this Prince [that was Choshiu] to abandon the system of duplicity and half-measures which he now follows, and openly declare whether he wishes to respect the Treaties, or sides with those who wish to tear them up.

Then the memorandum further states the unanimous agreement of the undersigned to the course that is going to be suggested, and then it proceeds:

How and where the first blow must be struck is easily determined by an examination of the present state of things.

While the majority of the party hostile to the Treaties has limited itself to menaces, the Prince of Choshiu has resolutely taken the initiative of attack, by prohibiting to foreign vessels all access to the Inland Sea, and by stopping the supplies of produce for the Nagasaki market carried on by native junks as has been shown by the successive reports received from the Consular Agents at that port; such a continued violation of the Law of Nations and formal negation of Treaty rights has been encouraged by the impunity which those perpetrating the acts have been allowed to enjoy.

The PRESIDENT.—I believe the point is very clearly made out.

Sir RICHARD WEBSTER.—That memorandum was signed by all the Powers I have mentioned—the United States among them—relying and insisting upon their rights under that Treaty.

Senator MORGAN.—With deference, I do not believe that the point has been clearly made out, and I beg to state the reasons, in deference to the judgment of the learned President.

The PRESIDENT.—I mean with reference to what Sir Richard told us.

Senator MORGAN.—My reason for saying that is this: The Tycoon of Japan was a military officer who undertook to put himself at the head of the Government, and retire the Mikado on his ecclesiastical authority simply.

Sir RICHARD WEBSTER.—That was Choshiu?

Senator MORGAN.—No, the Mikado—on his ecclesiastical authority simply, and to cut him out from any participation in the civil Government. The Tycoon while thus established, was denied by the Japanese the powers of the Government to make that Treaty with Great Britain. I have never been informed that the United States was a party to it or the Netherlands, or France. That matter went on until a strife, a revolution, occurred in Japan, by which the feudal chiefs (of whom the Prince of Choshiu was one, Prince Negato) undertook to affirm and re-establish the authority of the Mikado. The British Government undertook to sustain the Tycoon and claimed the authority of the Treaty it had made with the Tycoon, and in doing so it of course continued to send its ships through these narrow straits of Shimonoseki. The Netherlands did the same and the United States did the same. When the United States ship was attacked, Admiral Macdougal went down with the "Wyoming", attacked the batteries of Prince of Choshiu, and beat them; also three ships of war that were stationed in this very narrow pass. The Tycoon was overthrown; the Mikado was reinstated in his power, and no new treaty arrangement has been made which gives to any of these countries a higher power than they had before. So that I beg leave to say, I suppose that that was an assertion on the part of Great Britain, France, the Netherlands and the United States, that that was a part of the high seas—a part of the open sea—through which the ships of all countries had the right to pass, and that was at the bottom of their contention.

Sir RICHARD WEBSTER.—I only say, Senator, with great respect, that from your own recital of it I should have thought that the contrary conclusion must have been drawn. That the rights were originally given by Treaty, as far as Great Britain was concerned, there is no doubt; and the fact that there has been no fresh Treaty since then, seems to me to point to the irresistible inference that on the rebellion of Choshiu against the lawful authority being put down, the old Treaty rights revived, and that we have continued to navigate the inland waters under the Treaty.

Senator MORGAN.—There was just the contrary contention by the United States, and upon that we paid back the indemnity money to Japan that she had paid us on that occasion.

Sir RICHARD WEBSTER.—I am only dealing with the information I have before me; but certainly, so far as I have been able to obtain information from the original documents at my disposal during the interval of the adjournment, they appear at present to support the view of this transaction that I have ventured to put before you. Of course if there be other official documents which show I am wrong, I shall at once admit it; but I cannot admit it in the face of the documents which are the only ones to which I have access up to the present time.

The PRESIDENT.—Mr. Senator, your opinion would be that the United States did not acknowledge the liberty of passing through these straits?

Senator MORGAN.—It demanded the liberty of passing through.

Sir RICHARD WEBSTER.—I cannot help thinking it will turn out that they claimed it under the "favored nation" clause, which was the idea that passed through Senator Morgan's mind—I cannot help thinking it will turn out that there was a favored nation agreement between Japan and the United States under which the United States claimed the same privileges which Great Britain had.

Senator MORGAN.—If so, there must have been, at the same time, some other justification.

r RICHARD WEBSTER.—Following the actual documents, I cannot assume that when Great Powers put forward Treaties, that real *fide* straightforward action was taken by the Great Powers.

ıe PRESIDENT.—At any rate, one fact is clear—that the Straits are than three miles wide.

ınator MORGAN.—They are about a mile and a half wide.

ıe PRESIDENT.—Then it would seem they were territorial waters ss Japan was brought to surrender what they considered as inland ɜrs.

r RICHARD WEBSTER.—The first right, as far as Great Britain is ɛrned, was by Treaty.

ınator MORGAN.—They had been open to the nations of the world— great many years prior to the action on the part of Great Britain ıaking the Treaty.

r RICHARD WEBSTER.—The original right of Great Britain to go ugh was by Treaty.

ɔrd HANNEN.—Great Britain preferred to take it by Treaty rather ı to assert it as an international right.

r RICHARD WEBSTER.—It does not seem to me that it is very close ıe point I was arguing; but, of course, the Senator was good enough ıy that he desired it examined by the Counsel of both parties; and ɛlieve (I speak with authority on this matter as my learned friend Piggott is present), I have given an accurate account of the trans- ɔn as far as Great Britain is concerned unless documents are pro- ɛd to show that I am wrong in that matter.

ou will remember, Sir, at the adjournment of the Tribunal, I had ısed most strongly that, in the case of all wild animals, in order to ıire property, possession must be taken; and, in reply to the ques- s put by the Senator before the adjournment, my contention is that ɔroperty at all could be acquired in a seal inside or outside terri- ıl waters till possession had been taken, and the only way in which ɔerty could be acquired is by taking possession; and, with refer- ı to the point he put to me as to what would happen if a United es subject killed a seal in the waters of Behring Sea, I would reply ım that prior to the year 1889, when President Harrison came into ɛe and the law was extended over the waters of Behring Sea up ıe eastern line, there was no prohibition against the killing of male ı at all outside what may be called the territorial waters of Alaska. t is, to say, outside the proper limit of territorial waters, there was ɔrohibition against a United States subject shooting a male seal, he would have acquired the right of property in that male seal by ting it, or killing it, or by capturing it, and by no other operation. ɔw, I desire to supplement what I said in regard to this matter by ring to two authorities only bearing on the question you were good ıgh to put to me with reference to keeping the animals alive in a ɔr in an enclosure. It is a question entirely of whether the enclosure hich they are held is such that you can, at any time, take possession ıem and capture them. That is referred to at page 31 of the British ument; and three authorities are given, one taken from a book, ɛh I think Mr. Justice Harlan has been recently looking through, ɔck and Wright's book on "Possession in the Common Law", and I from page 31 of our Argument:

ıspass or theft cannot at common law be committed of living animals *feræ æ* unless they are tame or confined. They may be in the park or pond of a per- rho has the exclusive right to take them, but they are not in his possession ı they are either so confined, or so powerless by reason of immaturity that they ıe taken at pleasure with certainty.

And then two instances of that are given, both of which are authorities in our Courts,—*Young* v. *Hitchens*, where fish only partly in a seine-net were held not to be in possession; that is to say, they were not sufficiently captured: and *Regina* v. *Revu Pothadu*, where fish in irrigation tanks in India (that is to say, large tanks not like ordinary ponds or stews, where fish are kept when in possession) were held not to be in possession.

Mr. Justice HARLAN.—I should like to say that you must read the sentence succeeding the one you read, in order to get at the full meaning of the author.

Sir RICHARD WEBSTER.—The succeeding sentence, as the learned Judge asks me to read it, is this:

An animal, once tamed or reclaimed, may continue in a man's possession, although it fly or run abroad at its will, if it is in the habit of returning regularly to a place where it is under his complete control; such habit is commonly called "*animus revertendi*."

The learned Judge must pardon me for pointing out, with great deference, this does not bear on the question of *what is sufficient possession*. I am not on the question of *animus revertendi* now, or, I am sure unintentionally, he would not have diverted the mind of the Court from the question of what is sufficient possession. I am not on the question of how that possession is continued, but what is sufficient possession; and the test of sufficiency is that they can be taken at pleasure with certainty; and, in the same way, I shall show you that animals which, in the proper sense of the word, have the *animus revertendi* can be so taken without exception.

It is to be noted that the taking of an animal *feræ naturæ* found at large, though in fact having an *animus revertendi*, will not be theft if the taker had not the means of knowing that it was reclaimed; not because there is no trespass, but because an essential ingredient of *animus furandi* is excluded by his ignorance that there was an owner. In some cases, also, theft is excluded by reason that the taking is constituted a lesser offence by Statute.

Mr. Justice HARLAN.—I only referred to it because it was used there in the argument to demonstrate the right to take them, and the right of possession was gone when they left the enclosure. I only meant to suggest that that sentence, taken in connection with the one you read, would perhaps give the whole mind of the Author.

Sir RICHARD WEBSTER.—If that impression is conveyed by that passage in the argument, it is not what the persons who framed the argument meant. What the persons who framed the argument meant was what is the question of what is sufficient possession, and that that can be retained by *animus revertendi*, not only do we not dispute, but in the subsequent passage that is pointed out. I do not think with great deference a lawyer would have stated it differently, though doubtless he would have been careful to point out, that possession is preserved by what the law calls *animus revertendi* because you have to differentiate the case of animals of which possession has been taken.

The PRESIDENT.—Do you understand the last phrase you read from Pollock and Wright as meaning, that when there is no *animus furandi*, when one takes this reclaimed game out of premises where it is generally kept, he would legally get possession of it?

Sir RICHARD WEBSTER.—I think that is not the sentence to which the learned Judge referred. The distinction would affect the question of its being a crime, but would not touch the question of property.

The PRESIDENT.—You do not think the other alludes to the question of property.

Sir RICHARD WEBSTER.—I think the question of property ended at the words "Such habit is called an *animus revertendi.*"

Those are the two sentences to which Mr. Justice Harlan called my attention. I only read further in case I should have omitted anything.

The PRESIDENT.—Still, it was interesting.

Lord HANNEN.—The Authors go on to point out that even if the animal has been tamed and reclaimed, yet, if it is at large so that the taker has no means of knowing it was private property, it negatives the idea of his having the *animus furandi.*

The PRESIDENT.—Yes; but what as to the question of property?

Lord HANNEN.—It does not touch the question of property in the man who has reclaimed, but only deals with the guilt of the person who took it.

The PRESIDENT.—You would consider the man who reclaimed remains legal owner.

Sir RICHARD WEBSTER.—As my Lord Hannen put, if the animal was his on the ground of having been tamed and reclaimed, and it was going to return to his dominion or place, it would still remain his.

The PRESIDENT.—So that the man that intercepted it would not be punished for theft, but it would not alter the property.

Sir RICHARD WEBSTER.—Yes. Take the case of a tame stray horse; I doubt very much if a man could be punished for theft if he simply caught the horse, and did not know whose it was, and kept it. He would have no defence to an action for not bringing it back; but he could not be charged with theft, because he would say:—It was a stray horse, and I took it because no one was there with it.

I will not overlook this question of *animus revertendi*, and I assure Mr. Justice Harlan that I had not the slightest idea of suggesting that property might not be continued by means of *animus revertendi* but it was the second branch of that which I was about to address myself to.

Mr. Justice HARLAN.—You must excuse me, I did so, because in printed Argument of Great Britain it is introduced in the discussion of the question of property.

Sir RICHARD WEBSTER.—I think quite rightly, but you must look at the argument as a whole.

Mr. Justice HARLAN.—I understand and I only meant that that sentence should be taken with the one quoted in the brief to get the full mind of the author.

Sir RICHARD WEBSTER.—Yes, I think the answer is to consider whether the person who framed it was considering the whole subject or part of it and I understand they were only dealing with possession as distinguished from how that possession would be continued.

Sir, I cannot state this question of what is sufficient possession better than in the language of Savigny which is cited in the United States Argument page 108:

> Wild animals are only possessed so long as some special disposition (custodia) exists which enables us actually to get them into our power. It is not every custodia, therefore which is sufficient; whoever, for instance, keeps wild animals in a park, or fish in a lake, has undoubtedly done something to secure them, but it does not depend upon his mere will, but on a variety of accidents whether he can actually catch them when he wishes, consequently, possession is not here retained; quite otherwise with fish kept in a stew, or animals in a yard, because then they may be caught at any moment. Thirdly, wild beasts tamed artificially are likened to domesticated animals so long as they retain the habit of returning to the spot where their possessor keeps them (*donec animum, i. e. consuetudinem, revertendi habet*).

Now I resume the thread which I dropped just before the adjournment. Pressed with the difficulty of contending successfully that the

presence of the wild animals on land or in territorial waters was sufficient, the advisers of the United States have endeavoured to supplement their case by saying that the property that the United States or the owners of lands have depends on *animus revertendi*. In that they are guilty of two fallacies. One I have endeavoured to expose; the other I am about to expose. The two fallacies are, first, that the suggestion that mere presence of the wild animals upon the islands gives property at all in the animal; and, second, that that property whatever it was is retained by what they are pleased to call *animus revertendi*.

I address myself as closely as I can to the second branch of the argument. I must put my proposition somewhat boldly, but I am open to refutation and answer if I make a mistake therein—I assert there is no instance in the books where the doctrine of *animus revertendi* has been applied, where possession had not been already previously taken. I say the doctrine of *animus revertendi* only applies where possession has been taken, so that, in fact, the person has had at some time or other the power of taking and actually capturing and possessing the animals. I care not which animal be chosen, I will take only one of the four or five instances there are in the books to which attention may be called; but I should like to take two, one of which certainly appeared very, very often in the argument of my learned friend, Mr. Carter, because I could not help thinking that like the bee that returns to the flower from time to time to get honey from it, whenever my learned friend, Mr. Carter, was a little exhausted, he returned to the bees themselves as his stock instance; and I do not think I shall be wrong in saying those highly-favoured bees appeared half-a-dozen times in my learned friend, Mr. Carter's argument, not too often for my purpose, because they are a very effective illustration of what I mean; I will take the case of the bees. There is never any property in the bees whatever till they have been hived. Every authority agrees on that—Roman, English, American, French. There is no property in the bees whatever till they have been hived. What does hiving mean? Hiving means that in a house prepared for the reception of the bees, moveable if it is considered desirable they should be moved—a skip either made of straw or a structure of wood capable of being closed, so that the bees can be carried away when in the hive, if you desire to take them to another place in that hive; when they have been so hived and by their habits continue to return home to that hive, then so long and so long only is there a property in the swarm or the herd, if my learned friend likes it, or the hive of bees. Take pigeons in a dovecot. The dovecot is provided and is repeatedly closed at night, but whether closed at night or not, it could be if necessary. In both cases there is food supplied where it is desirable that the animal should have food.

The PRESIDENT.—You do not speak of a tame dove now.

Sir RICHARD WEBSTER.—I speak of a dove or pigeon in respect of which this *animus revertendi* is supposed to continue the possession—pigeons in a dovecot or pigeon-house. It depends on what you call tame, because there is no case in the books of the wild pigeon that nests in your trees or the rocks, which come back every day or every night, having fed in the fields of the adjoining farmers, being your property. On the contrary, it is specifically put with respect to the pigeons that are housed in the dovecote.

Lord HANNEN.—Homed.

Sir RICHARD WEBSTER.—Yes, their home is in the dovecote or pigeon-house. Whether they are tame birds in the sense of feeding out of your hand is a question of degree.

The PRESIDENT.—You mean pigeons not fed by the hand of man.

Sir RICHARD WEBSTER.—Well there are and there are not—as a matter of fact speaking of these pigeons if they cannot get food in very hard times in the fields they would be fed in the dove-cot, and indeed the way they are induced to come to the dove-cot in the first instance is that food is scattered and they are attracted to it by the art of man. But my point is, and I challenge my learned friend to contradict it, that there is no case of the doctrine of *animus revertendi* being applied, except where the animal has previous to its departure been in some place in which possession has been or could be in fact taken. I have all the authorities under my hand and you will remember them—the geese that fed out of the man's hand and were driven away by the Defendant's dog which had twice been brought back and said to be so tame they fed out of the man's hand: the bees in their hive: the pigeons, as I have already said, in their dove-cot or house: the deer which have been made so tame that they will go into an enclosure or stable where they could be kept if it was desired to keep them, and have been so accustomed to it by the hand of man that they come back intending, as Savigny puts it, and I cannot put it better than it is put in page 108. "To return to the spot where their possessor keeps them."

Now what is the case made to day? The case made to-day is that migratory instinct is equivalent to *animus revertendi*, that is to say the fact that the animal, the seal, in the spring of the year, comes to the land—either the male from sexual instincts, or the female to be delivered of its young—that it is the habit of coming to and fro to the land for a limited portion of the year and then returning to the sea—it is said that that migratory instinct in equivalent to an *animus revertendi*.

Now I appeal, Mr. President, to you and to every member of this Tribunal, as a lawyer, and I appeal to their impartial judgment that they can not only find no authority, but not even a vestige of an authority for the suggestion that migratory instincts are sufficient to give a property in animals on the ground that that is an *animus revertendi*. Sir, if that be the case there are literally speaking in England (I do not know enough about the United States to speak of them) hundreds of kinds birds that in their migration come back to the same identical spot—to the same tree and year after year make their nests in the same place or repair the old nests and occupy the same place, and those birds may go away at other times of the year from equally natural instincts either climate or from some other cause—because the food does not suit them—and yet not only is there no trace of such a doctrine, but whenever the matter has come up it has been pointed out that migratory instincts are not sufficient. Every authority that my learned friend has cited supports my contention. I remember one—though I could go through all, but they were exhaustively examined by the Attorney General—*Hammond* v. *Mockett* where the crows, or rooks as they ought to be called, built regularly in a man's trees, came regularly there and were in the habit of frequenting those trees in his property. It was held on the same principle we have been discussing, though there was not only the strongest *animus revertendi* but an indisputable *animus revertendi*, that there was no property in them.

Mr. Justice HARLAN.—Was not that mainly on the ground that the Court said it was an animal that was not useful but a nuisance?

Sir RICHARD WEBSTER.—No, certainly not. I say the whole of the earlier part of the judgment proceeds entirely upon the question of property. There being no property in the animal at all as being an

animal *feræ naturæ*, they do, in the other part of their judgment, refer to the fact that rooks are not *usually* of an article of food. If you will be good enough to look at the full report of that case, you will find some five or six out of the eight pages of the Judgment proceed entirely on the ground I have been mentioning to you, that there is no property in a wild animal simply because it returns and lives in my trees or my ground; and not being an article of food comes in entirely at the end of the Judgment, and is not made the subject of the Judgment.

Senator MORGAN.—It might not do to assume, accepting your distinction to be correct between migratory instincts and *animus revertendi*, that the seals that occupy Behring Sea periodically are drawn to those Islands by simply migratory instincts. For instance, a nursing mother, that goes out to find food in order to nourish herself to be able to feed her young could not be said to return under a migratory instinct, but an *animus revertendi*.

Sir RICHARD WEBSTER.—I was not attempting to deal with any specific difference which may be drawn between particular seals or classes of seals.

Senator MORGAN.—But the principle, unless it applies clearly all through, does not apply at all.

Sir RICHARD WEBSTER.—If you say so and give judgment, then I must bow.

Senator MORGAN.—No, I do not say so, and I do not give judgment; I make a suggestion for you to argue.

Sir RICHARD WEBSTER.—I can scarcely conceive, Senator, if persons were in a position to establish ownership in any particular animal, that that would carry with it those animals to which none of those principles applied.

Senator MORGAN.—It might not.

Sir RICHARD WEBSTER.—But your assumption was that, if the principle applied, it applied all through.

Senator MORGAN.—No; I make no assumption, I simply put a question. If it is applied at all, should it not be applied throughout? And I think that is a fair question for you to answer.

Sir RICHARD WEBSTER.—I agree; and I do not shrink from it; you have to see what the principle is; and it is this, not that the animal is property during a given month, or during a certain number of weeks, but always property, and this property for which my learned friend contended is property in the seals when they are thousands of miles away at all times of the year. It has been put by Mr. Carter and Mr. Coudert orally, and in writing by Mr. Phelps, that that property follows the animal wherever it is; and it might be impossible to justify a claim upon the limited view or application of the principle which I am referring to. But, if I might again respectfully put my point, I will then pass from it, that there is no greater property in the pup than there is in the mother, or in the two combined; and I say, with great respect, that, until possession has been taken, the true doctrine of *animus revertendi* does not apply. If you will remember, I was protesting against the idea that migratory instincts, speaking of the herd as a whole, can be turned into *animus revertendi*, but my main proposition, which I enunciated a few moments ago, is, that, until possession has been taken in the sense that that animal has been in such circumstances that the man has actually captured it, the doctrine of *animus revertendi* has no application of any sort or kind.

The wild deer that is in the park, and that never has been tamed or reclaimed at all equally has the *animus revertendi* to return to feed, per-

ps to the same pastures as the tame one. The hind that drops the alf has the same *animus revertendi* to return and feed the calf wherever may be; but until possession has been taken, neither in one case nor the other is there any property.

But it may be said to me—You are not stating the law as to the trongest case that can be put against you sufficiently fairly.

Before I come to that however, I would ask Mr. Justice Harlan's atten-on in justification of what I have said, that so far from the doctrine f the rooks not being fit for food, being the *ratione decitendi* or the basis f the judgment in *Hannam* v. *Mockett*, in a passage which unfortu-ately is by a inadvertence not set out in the United States Case, imme-iately following where they do stop, and within a few lines of it, this assage occurs:

And even with respect to animals *feræ naturæ*, though they be fit for food, such as bbits, a man has no right of property in them. In Bolston's Case, it was adjudged at if a man makes coney burroughs in his own land which increase in so great umber that they destroy his neighbour's land . . . he has no property in them.

Of course you know, Mr. President, that "conies" are rabbits. It is he word that is used in this case to describe rabbits.

Mr. Justice HARLAN.—That means that he has no property in the vild animals simply because they are wild.

Sir RICHARD WEBSTER.—No, sir; simply because they are coming ack; they are supposed to have gone off; I agree that they are rab-bits supposed to have gone off the land of the man who made the coney burroughs on to another man's land.

Mr. Justice HARLAN.—On what land are they killed?

Sir RICHARD WEBSTER.—They are killed on the land of the stranger. here are two adjoining proprietors, A and B. A makes coney bur-oughs, or in other word a house for the conies, feeds them, if you like, uts down turnips in hard weather in order that the conies may not eat is trees. The rabbits run out of their holes and run on to the land of e adjoining owner B; B shoots them. They are B's rabbits when he as shot them, and A has no claim against him, in other words although e made the coney burroughs, A has no property in them. I think, Sir, at as to the distinction which you have put to me, tending, to remove e force of my argument based on *Hannam* v. *Mockett*, I have satisfied ou that it is impossible on a fair examination of this judgment to come the conclusion that the fact that the rooks were not ordinarily fit for od had anything to do with the judgment at all.

Senator MORGAN.—If C shoots the conies on the land of B, they belong B *ratione soli?*

Sir RICHARD WEBSTER.—If C reduces into possession, by killing, e wild animals on the land of B, the dead animal it belongs to B. hat is a fiction of the law.—

Senator MORGAN.—Ah!

Sir RICHARD WEBSTER.—Well, Senator, I am not unwilling to grap-le with the point.

Senator MORGAN.—I beg your pardon; I did not think it was a fic-ion of the law, I thought it was a provision of the law, a decision.

Sir RICHARD WEBSTER.—Really I used that expression, but I did ot mean fiction in that sense. I merely meant the dead animal being thing which, as was said in the House of Lords, is in somebody's ossession, it is given by our law, contrary to the civil law, contrary to he Roman law—

The PRESIDENT.—And to the French law also.

Sir RICHARD WEBSTER.—Yes. The possession is given to the man on whose land it falls and not to the trespasser.

Senator MORGAN.—Suppose that C when he kills the coney is on the public highway and kills it there. Whose property is it then?

Sir RICHARD WEBSTER.—I believe it would be the property of the killer.

Lord HANNEN.—Other questions may arise in that case. If it is only a right of way, the property may belong to another person.

Sir RICHARD WEBSTER.—Yes; you have to consider what kind of a road the highway is.

Senator MORGAN.—The King's highway where everybody has a right to go, and nobody has a right to trespass upon the property of his neighbour?

Sir RICHARD WEBSTER.—I, Mr. President, have been accustomed now by long training, if I can, to go straight to the real point; and the real point is that there is no property in any of these animals until they are captured alive or dead, and therefore it makes no difference to my purpose in whom the property is after they are captured, after they are dead. If I am well founded—and I am quite willing to stake my case upon it—that there is no property in wild animals until possession has been taken of them, and that the only effect of the *animus revertendi* is to preserve the property acquired by the taking of possession as long as the animal is coming back and intends to come back to the premises of the person who has reclaimed or tamed it, the whole question of whose property it is after it is dead is absolutely academic. It throws no light whatever upon the matter. According to the French law, as you have said, and as I have found out myself by research, the animal killed on the property of another man belongs to the man who shot it. According to the English law and the doctrine that a man shall not take advantage of his own wrong the animal belongs to the man on whose land it lies when it is dead.

The PRESIDENT.—That is a special provision of the law.

Sir RICHARD WEBSTER.—It is a special provision, and it does not advance us on the road one single step.

The PRESIDENT.—It seems contrary to the principle?

Sir RICHARD WEBSTER.—I do not really know whether it is contrary to the principle or not. It seems to me entirely—I will not use that word fiction again—a rule one way or the other. It makes no difference to the point we are considering, and it seems to afford no light or assistance.

The PRESIDENT.—You are aware that under the French law a man who has a wood in which are conies is responsible for the damage which the conies do to a neighbour; but that does not alter, I believe, the question of property.

Sir RICHARD WEBSTER.—But also by the French law, Mr. President, if the conies run out on the other man's land that other man may shoot them.

The PRESIDENT.—Yes.

Sir RICHARD WEBSTER.—And therefore, as a conclusive answer, as far as property is concerned, the man out of whose wood they have run has no property in those conies. And they might equally be said to be the property of the man on whose property they have run.

Mr. President, may I point my argument in one sentence, showing you the bearing of the two limbs of the argument. I assume I have made my ground good, and to avoid repetition I assume that I have satisfied you that there is no property in a wild animal going on to a

nan's land simply by virtue of its going there; that he has only got right of killing it and capturing it and treating it as his keeping ther persons off his land.

That animal runs away, swims away, or flies away from the man's and. How can the fact that the animal intends by natural instincts o return to that same piece of land give the man a greater property han he has when the animal is on the land. If I have not made my point clear though I hope I have, let me repeat myself. The animal comes on to my land. I assume for the purpose of my argument that I have shown you that according to the law of all civilized nations I have no property in that wild animal. The animal leaves the land, meaning to come back the next year, if it has any intention at all by natural instinct to come back to the land. When it is off the land in the sea how can the *animus revertendi* in that sense, the instinct to return, give me when the animal is off my land, a greater property than I had when the animal was on it. Sir, I submit to this Tribunal that the more this question of property is examined the more impossible—I will not use any word which my friends may think not sufficiently respectful to their position—the more impossible their position becomes. It may be said that I have not correctly stated the law as o these cases where the *animus revertendi* continues property—not ives it, please. It never does anything but continue property. The nimus revertendi only continues the property which has been created y some previous act.

The PRESIDENT.—I do not believe the contrary was argued, Sir Richard.

Sir RICHARD WEBSTER.—I do not know that, Sir. I have no right o assume it.

The PRESIDENT.—I believe the question was about possession.

Sir RICHARD WEBSTER.—Would you be good enough to look, Mr. President, at page 109 of the United States Argument, where in a book f the highest authority, cited by everybody with approval, cited by my learned friends as supporting their proposition—I mean the second ook of Bracton—the language is:

> In the first place, through the first taking of those things which belong to no erson, and which now belong to the King by civil right, and are not common as f olden time, such, for instance, as wild beasts, birds, and fish, and all animals which are born on the earth, or in the sea, or in the sky, or in the air; wherever hey may be captured and wherever they shall have been captured, they begin to e mine because they are coerced under my keeping, and by the same reason, if hey escape from my keeping, and recover their natural liberty they cease to be nine, and again belong to the first taker.

Can anybody have the hardihood to suggest that the seals do not ecover their natural liberty?

The PRESIDENT.—I thought you argued that they had never lost it.

Sir RICHARD WEBSTER.—Certainly.

Senator MORGAN.—The first question is, what is their natural libty? Is natural liberty feeding in the sea or existing and being born pon the land.

Sir RICHARD WEBSTER.—Senator, with very great deference, it does ot touch my point the least in the world. I care not what view you ike, whether they are upon the land and get all their food upon it and o not go out into the sea at all. My position is, you do not get any roperty, according to the law of all civilized nations, until possession as been taken.

Senator MORGAN.—That is, provided they are animals *feræ naturæ*?

Sir RICHARD WEBSTER.—Certainly; but we must not have the ques-on shifted every moment.

Senator MORGAN.—No; I do not shift it at all. I supposed you meant subject to that qualification.

Sir RICHARD WEBSTER.—I hope so. The seals have never lost their liberty. The seals that are driven and killed possibly have not much liberty left. The seals that are not driven and go away have never lost their liberty at all. If a man has tried to drive them if he let them go he does not restrain their liberty.

The PRESIDENT.—I believe that is agreed between both parties, what you have just stated.

Sir RICHARD WEBSTER.—It may be, Mr. President. Of course it is not possible to argue every point at the same moment; and that is why I reminded the learned Senator that the introduction of the suggestion which he was good enough to make to me did not bear upon the argument which I was proceeding upon. I was proceeding upon the theory that originally the seal was an animal *feræ naturæ;* that it never has lost its liberty; and that never having lost its liberty no possession has been taken of it; that no possession or occupation having been taken, the doctrine of *animus revertendi* has no application at all. I was met with the case of the bees; and accordingly I desire to say that the strongest case they can put, namely, that of those bees, fails them altogether.

Now Bracton puts it on their originally having lost their liberty:

But they recover their natural liberty then, when they have either escaped from my sight in the free air, and are no longer in my keeping, or when they are within my sight under such circumstances that it is impossible for me to overtake them. Occupation also comprises fishing, hunting, and capturing.

Now then, here is the point the Senator put to me about wishing to drive them:

Pursuit alone does not make a thing mine, for although I have wounded a wild beast so that it may be captured, nevertheless it is not mine unless I capture it. On the contrary it will belong to him who first takes it, for many things usually happen to prevent the capturing it. Likewise, if a wild boar falls into a net which I have spread for hunting, and I have carried it off, having with much exertion extracted it from the net, it will be mine, if it shall have come into my power, unless custom or privilege rules to the contrary.

There were certain privileges about wild boars that prevented people from catching them at one time, and that was what Bracton was referring to.

The PRESIDENT.—Was that under the feudal law or in general?

Sir RICHARD WEBSTER.—I think they were under the feudal laws.

Occupation also includes shutting up, as in the case of bees, which are wild by nature.

I do not know whether the American Judge referred to meant to contradict this or not.

For if they should have settled on my tree they would not be any the more mine, until I have shut them up in a hive, than birds which have made a nest in my tree, and therefore if another person shall shut them up, he will have the dominion over them. A swarm, also, which has flown away out of my hive—

That is to say, which has already been reduced to possession in the hive:

is so long understood to be mine as long as it is in my sight, and the overtaking of it is not impossible, otherwise they belong to the first taker; but if a person shall capture them, he does not make them his own if he shall know that they are another's, but he commits a theft unless he has the intention to restore them. And these things are true, unless sometimes from custom in some parts the practice is otherwise.

ow, I should ask the Senator kindly to let me read this great author-
upon the question which he introduced a moment ago into my
ument, as to whether seals are domestic or not.

hat has been said above applies to animals which have remained at all times
; and if wild animals have been tamed—

there any living being who suggests that these seals have been
ed? Could any reasonable man suggest it for a moment.

ild animals have been tamed, and they by habit go out and return, fly away—

hat means with a tamed habit,

as deer, swans, seafowls, and doves, and such like, another rule has been
oved that they are so long considered as ours as long as they have the disposi-
to return; for if they have no disposition to return they cease to be ours. But
seem to cease to have the disposition to return when they have abandoned the
t of returning; and the same is said of fowls and geese which have become wild
being tamed.

Ir. President, there is not, I submit, the shadow of a doubt that this
it of returning means the habit of returning after they have been
ed, not the habit of returning while they are in a wild condition.

he PRESIDENT.—You made your case perhaps easier in saying that
seals had been stated to be tame. They were not precisely argued
e tame. They were argued to be the object of what Mr. Carter
ed a husbandry.

ir RICHARD WEBSTER.—With great deference, Mr. President, there
o case in which what my friend Mr. Carter calls the creation of a
bandry has been supposed to be equivalent either to taming or taking
session of the animal. The sparing and not slaughtering the whole,
abstaining from the right to kill on your land never has been sug-
ted as giving property. I could give you instances without number.
y, in the case of the rabbits, there is not as much husbandry in the
s as there is in the rabbits. It seems to me, Sir, that the mere
ement of the case of rabbits is sufficient. The rabbit man, on the
othesis, may construct the burrows. Nothing of that kind is done
the seal. No house is built for them. The man, if he chooses to do
an feed the rabbits, to induce them to return.

he PRESIDENT.—You compare the seal to the rabbit, upon which
e is no doubt. Suppose we compare them with the bee. The bee is
a tame animal.

ir RICHARD WEBSTER.—Let me compare it, Sir, with the case of the
. In the case of the bee, the man builds the hive, builds the house
which the stock is going to be hived. As a matter of fact, as you no
bt know perfectly well, he does in hard weather actually feed the
s, and he does make convenient places in which the bee can store its
ey; and modern invention has actually assisted him in the formation
he comb in which the honey will be placed.

ord HANNEN.—Those are the grounds upon which the French law
ased in the case you refer to.

he PRESIDENT.—You know you just objected to calling the pigeons
e. You would not call the bees tame, either. I think the word
me" is not quite correct.

ir RICHARD WEBSTER.—I am afraid, Mr. President, I did not make
meaning clear. I did not object to your calling the pigeons tame.
erely suggested I was not dealing with the case of tame animals in
t sense, but of animals which had been by the act of man induced to
e up a lodging in his dovecote, to go out and return, and I desired the
inction to be drawn so that you would not think I was referring to

animals that would come and feed out of your hand. The bee is hived, and, as the French law has pointed out, hived by the act of man, and induced to return to that place, as Savigny puts it, where the owner keeps them, where the owner has the means of taking possession of them. He can shut up the door of the hive and carry the whole hive away with him. That is the degree of possession in the case of the bee; and it is quite remarkable when you remember that the mere settling of a swarm of bees upon your tree gives you no property in them.

Senator MORGAN.—Suppose the bees go into the tree and make their hive there without your assistance, do not they become your property?

Sir RICHARD WEBSTER.—Simply and solely because you have got the power of cutting down the tree and taking the honey, and nobody else can do it.

Senator MORGAN.—That is the whole matter. You have got the dominion over it.

Sir RICHARD WEBSTER.—If you say so, that is sufficient. I can say no more.

Senator MORGAN.—I suggest that; I do not assert it.

Marquis VISCONTI-VENOSTA.—So you say that the animal has not the *animus revertendi* unless it returns to the place where man has previously kept it. That is your contention?

Sir RICHARD WEBSTER.—That is my contention; that according to the law of all civilized countries, *animus revertendi* has no operation at all until the man, has had the animal in his keeping. It is not my own language, Mr. President.

Mr. Justice HARLAN.—You mean in his actual manual keeping?

Sir RICHARD WEBSTER.—No.

Mr. Justice HARLAN.—I did not so understand you, but I thought I would ask the question, so that you might bring out the point.

Sir RICHARD WEBSTER.—I do not think it could fairly be put upon me that I meant that. I took the case of deer, that are induced to come into a stable, and which by food being placed there, and by men going among them, can be fed and tamed in the sense which Mr. Carter relies upon as was the case of the deer in the park of Lord Abergavenny. It would not be right to say they were in the manual possession, in the sense of being held, but they were in such a possession that at any moment the man can take possession of the whole of those which are tame, and they have got the intention of returning to the place where the man has had them in possession.

The PRESIDENT.—I beg your pardon; it perhaps is not quite regular, but it might be well to ask Mr. Carter, or one of the other gentlemen to tell us what their view of this matter is. It would make the case more easy for us.

Sir RICHARD WEBSTER.—I am afraid it would be inviting their reply now, Mr. President. That is all.

The PRESIDENT.—Of course if you would prefer to continue your argument.

Sir RICHARD WEBSTER.—I have said all I desire to say.

The PRESIDENT.—I thought there was no difference between you as to *animus revertendi*.

Sir RICHARD WEBSTER.—By all means, Mr. President, if you will put the question, I shall be only too glad to submit to your wishes.

The PRESIDENT.—No; I think it will be answered later; and you might perhaps go on with your argument.

Sir RICHARD WEBSTER.—Mr. President, I will only say, if you will forgive me for repeating it, that in every one of our books of authority, Blackstone, Bracton, Savigny and all the books, the law has been stated

n this way, without deviation. My position is that there is nothing to he contrary. You are asked to invent this law for the benefit of the United States. The learned Senator put to me just a moment ago the question, supposing the wild bees light in your tree, you have got he dominion over that tree and consequently the property in that swarm.

Senator MORGAN.—I mean if they build their nest inside the tree, go inside and make a hive there, if it is a hollow tree, without your assistance.

Sir RICHARD WEBSTER.—"Though a swarm light upon my tree, I have no property in them until I have hived them any more than I have in the birds which make their nests there".

Senator MORGAN.—That may be true. But suppose they hive themselves in that hollow tree without your assistance; then whose property are they?

Sir RICHARD WEBSTER.—They are simply nobody's property at all. My submission is that the man into whose tree they have gone has no property in them whatever, except in the sense that he has a greater right and power of taking them than anybody else. There is no book, and I think no case which, when examined, suggests the contrary for a single moment. I cannot do more, Sir, than answer your question, because I think that will be exhaustive of the matter.

Senator MORGAN.—I had running in my mind an incident that happened to pass under my observation. I suppose you will pardon me for stating it.

Sir RICHARD WEBSTER.—Certainly.

Senator MORGAN.—On the Tennessee River, a few miles below Chattanooga a cave has existed for many years, and has been occupied by bees, which have made many tons of honey there; and I think it has never been doubted that the bees and honey, and everything there belonged to the owner of the soil. He had no agency in them, and no inducements for the bees to return to it. It has been going on there in that way for a great many years.

Sir RICHARD WEBSTER.—There is no case in the books in which any such question has ever been raised and decided; and most unquestionably in the case in which it has been raised, it has been put upon the right, *ratione soli*, of taking possession of the animals that have come there by their natural instinct, and have not come there by any act of man.

I apologise to you, Mr. President, and the other members of the Tribunal, for dealing with a matter which was so fully dealt with by my learned friend, the Attorney-General; but I hope the Tribunal will not think that in endeavouring to make this question of the supposed analogy between bees, seals and pigeons clear, I have unduly occupied the time of the Court; because if there be a lingering doubt in the mind of the Court, I prefer, at any rate, that our case shall be presented, and that no member of the Tribunal shall say that we have endeavored to shrink from any point or to avoid any point which any member of the Tribunal thought it important to make.

The PRESIDENT.—I think your observations were very useful, Sir Richard.

Now I desire, Mr. President, to answer if I can of another of the propositions which we think, as I said, involves a fallacy. I am bound to say that here I can rely a little bit on the difference between Mr. Phelps and Mr. Carter. I will not ask them before the Court to settle their little differences, but Mr. Phelps is of opinion, and I shall submit

rightly of opinion that the United States would be doing no wrong if they killed every seal on these islands, and in law they have the right to kill every seal if they can, and when they have killed all the seals they will have the property in them—my learned friend, Mr. Carter, to support his most ingenious argument says that no possessor of property has an absolute title, but only the usufruct is given him. You will find it in print at page 59.

The title is further limited. These things are not given him, but only the usufruct or increase.

Then my learned friend, Mr. Coudert, sides with Mr. Phelps. Mr. Coudert thinks they might have killed every seal also without breaking any law. I was much interested in this discussion, though not as a lawyer; and I looked through all the authorities so courteously sent me by Mr. Carter, and I find this doctrine of man only having the usufruct, and only being allowed to enjoy the income and not touch the principal —only allowed to take the increase and not diminish the stock, has no place in law whatever. It only finds a place in the writings of political economists who speak of the gain there would be to the community at large by a man only using a portion of his wealth, that is to say not spending every thing he has, but only living out of the fruit of his property.

Lord HANNEN.—But what practical bearing has that, whether they would be entitled to do some thing which they never intended to do?

Sir RICHARD WEBSTER.—Mr. President, I should, perhaps not as crisply as my Lord, have made that comment, and I only point out it is used by my learned friend, Mr. Carter, as ekeing out the claim to property by the United States. It is suggested by Mr. Carter that the property is to be given to them, I suppose on legal principles, because there has been that exemption. Well, perhaps I may be permitted to say I have looked through every law-book I could get, both English and American that we have, to see if there was any foundation for this rule according to the law of any of these countries, and certainly there is not, and it is extremely well dealt with by the French Code by Article 544. It puts it in a way I cannot improve upon.

Property is the right of enjoying and disposing of things in the most absolute manner, provided one does not make a use of them prohibited by laws or regulations.

So that unless, in other words, the law has said, you shall not kill an animal at a certain time of the year, for some reason or other, there is no principle of law that confines the property in any animal to simply enjoying and using the annual produce of it.

Now where is this principle of property to stop if my learned friends are correct in this contention? I have taken some interest in natural history for many years, and I would only remind you of the number of instances which are analogous in which, according to the law of all nations no property is given, and I do not propose a better one than that of migratory birds. If it was a question of natural history discussion, I could give many instances of cases in which particular breeds of birds breed in two or three places which are known. Every member of the families of birds could be destroyed by the owners of these particular places. Their eggs could be taken; their young could be taken, and the race in a very few years exterminated; and I say that it is idle to endeavour to apply this principle to one particular class of animals which have no feature which in law creates any distinction. These Pribilof Islands happen to be a very remarkable instance. On them there are myriads of birds that frequent year by year the islands, come

ε every year in regular succession, and breed there and produce r young there; if the principle is worth anything it must be sug-ed that property in them should be given, because the breasts of e birds could be plucked for the adornment of ladies' hats, or the fing of cushions or quilts or making of warm coats for people, out which a most useful industry has sprung.

ıe PRESIDENT.—Do they not regularly get the eggs of those birds.

r RICHARD WEBSTER.—They do, but I put it higher than the —where the birds were most useful for the benefit of mankind. t is to say that you actually want the animal or the bird itself—it ht be the plumage of the Eider duck; but it is not confined to that ıny means—there are numbers of other birds whose plumage is ılue and much more a blessing to mankind than the seal skins over ch my learned friend Mr. Carter shed tears; but I put it to you if suggested law is worth anything it must apply to persons whose s breed in his cliffs and on his land, and go out to feed at sea 10 or r 20 miles away, and which have been slaughtered by United States ens and other persons without let or hindrance all over the world, ıuse there is no property. I entirely deny that there is any dis-tion between fish and birds: perhaps I may take an opportunity ; week of saying a word as to the fallacy which underlies my ned friend Mr. Carter's argument in the matter of fish. But as I ɔ not time to do that to-day, I might tell you some of the instances sh which would give as great a claim to property. On many of rivers of the east coast of Scotland the fish of the river are as inct as they can be. There are two rivers that run into the Moray h: the Ness and the Beauly. They are Salmon rivers and they ɔ perfectly distinct Salmon. No Ness salmon are ever seen in the uly, and no Beauly Salmon are ever seen in the Ness. They go and feed in the Ocean and are caught promiscuously there and if owners of those rivers did not exercise the abstinence that my ned friend talks about they could be killed to such an extent that in w years no fish would be left.

he PRESIDENT.—Are there not laws relating to that?

r RICHARD WEBSTER.—None except a close time, and a provision ; the nets shall not be put in more than a certain number of hours ɔek. There are local laws that in every week nets must be left off 48 hours, or 24 hours as the case may be, so that the fish can get up down again, but that is entirely by municipal legislation. So far ıctual property is concerned in these fish there is no distinction. y can be identified when caught as to which river they have come ı, and they are, as a matter of fact, though I am anticipating, arti-lly hatched and bred largely to increase the stock in a great number ɔlaces: a form of industry which is impossible according to our ɔent knowledge of seals, and yet in this case property in the fish has been recognized.

he PRESIDENT.—Are they ever fished in the open sea?

ır RICHARD WEBSTER.—Yes.

he PRESIDENT.—There is no municipal law against that?

r RICHARD WEBSTER.—No; there is no municipal law against , except on some of the foreshores there are certain privileges of ing nets; but that is a privilege given to certain persons under al franchise, and has nothing to do with the open sea.

ɔnator MORGAN.—In your studies of Natural History, Sir Richard, ch seem to be very broad and very exact, have you found an animal,

feathered, furred, or scaled (the coating makes no difference) that, by its instinctive characteristics, surrenders itself in regard to its power of escape to the same extent as the fur-seal does on the land?

Sir RICHARD WEBSTER.—That entirely depends on what you mean, Senator Morgan, by "surrenders itself". When I come to that part of the case, what I am going to suggest to you is, except people get round and frighten it, it never surrenders itself at all. May I tell you an exact case that seems in point? One of the most interesting birds on the coast of Scotland is the Solan Goose, which is a very beautiful bird that breeds, so far as I know, in two or three places only, and one of those places is off the Orkneys, 100 miles out,—there are two Rocks, called the "Stack" and the "Skerries", out in the Atlantic; and people go to take a certain number of eggs, and the hen-birds, the wildest known, will sit on their nests, so that you can hit them with a stick as you pass by.

I have known people who have done it, they will hiss at you, and these wild birds, while sitting on their nests will allow you to knock them on the head, if you like.

Senator MORGAN.—Then, as to the male bird?

Sir RICHARD WEBSTER.—Well, he would not be much use without the hen.

Senator MORGAN.—So that, if you kill the males and not the hens, there will not be much progress in killing.

Sir RICHARD WEBSTER.—The male bird would fly away; and, if you attempted to drive the bull-seals away, you would not have much progress then.

Senator MORGAN.—But they do not seem to escape at all.

Sir RICHARD WEBSTER.—I cannot tell what is in your mind as to the habits of these seals—I shall have to trouble you some other day with regard to that; but that I should not be thought to have my answer ready, I submit what happens with regard to these seals is, that they are frightened and from fear and fear alone are made and not induced (in the ordinary sense of the word) to travel long distances out of what I shall call their natural element are reduced into a condition where they suffer immensely, and being in that condition from which they cannot escape, they are then killed, and if that is surrendering themselves—supposing that is what you mean by it—I have not a word to say.

Senator MORGAN.—I never heard that seals were so frightened as to haul out of the sea on to the shore.

Sir RICHARD WEBSTER.—No, but you were good enough, as I understand, to put it to me that they surrender themselves so that they could be dealt with by man.

Senator MORGAN.—I do not mean by a voluntary act, but by an instinct from which they cannot escape.

Sir RICHARD WEBSTER.—Of course, you have more knowledge than I have of this, but I do not suppose a three or four year old seal, when he comes out for the first time, knows that he is going to be driven, I venture to think that if a seal comes out upon the island, he has no idea he is going to have boys to shout round and drive him up till he is in the condition to which I will call attention some day or other, and then to receive the final blow.

Senator MORGAN.—And I have no idea that he would have any such expectation, but if he had, I think he would come out any way.

Sir RICHARD WEBSTER.—I do not think the evidence supports your inference, Sir; but that is not a matter we are discussing. You must not take me as saying anything to show that I accede to or acquiesce in your view of the facts.

I entirely deny, you must understand, that that condition of things is at all different from that which exists in the case of many other birds and animals; and I say, submitting or surrendering in that sense is common to many other animals besides the seal. It is as common an incident in the life of the salmon as it is in the life of the seal. It is obvious, at this time of the day I should not be justified in attempting to answer you at greater length than I have in the few words I have addressed to you in reply to your question.

[The Tribunal then adjourned till Tuesday next, June 6th, 1893, at 11.30 o'clock A. M.]

THIRTY-THIRD DAY, JUNE 6TH, 1893.

The PRESIDENT.—Before you begin, Sir Richard, Mr. Gram wishes to say something.

Mr. GRAM.—The Appendix vol. I to the United States Case gives the text of the law and regulations relating to the protection of whales on the coast of Finnmarken. It was my intention later on to explain to my colleagues these laws and regulations, by supplying some information about the natural conditions of Norway and Sweden which have necessitated the establishment of special rules concerning the territorial waters, and to state at the same time my opinion as to whether those rules and their subject matter may be considered as having any bearing upon the present case. As, however, in the later sittings reference has repeatedly been made to the Norwegian legislation concerning this matter, I think it might be of some use at the present juncture to give a very brief account of the leading features of those rules.

The peculiarity of the Norwegian law quoted by the Counsel for the United States, consists in its providing for a close season for the whaling. As to its stipulations about inner and territorial waters, such stipulations are simply applications to a special case of general principles laid down in the Norwegian legislation concerning the gulfs and the waters washing the coasts. A glance at the map will be sufficient to show the great number of gulfs or "fiords", and their importance for the inhabitants of Norway. Some of those "fiords" have a considerable development, stretching themselves far into the country and being at their mouth very wide. Nevertheless they have been from time immemorial considered as inner-waters, and this principle has always been maintained, even as against foreign subjects.

More than twenty years ago, a foreign government once complained that a vessel of their nationality had been prevented from fishing in one of the largest fiords of Norway, in the northern part of the country. The fishing is carried on in that neighborhood during the first four months of every year, and is of extraordinary importance to the country, some 30,000 people gathering there from South and North in order to earn their living. A government inspector controls the fishing going on in the waters of the fiord, which is sheltered by a range of islands against the violence of the sea. The appearance in these waters of a foreign vessel pretending to take its share of the fishing, was an unheard of occurrence, and in the ensuing diplomatic correspondence the exclusive right of Norwegian subjects to this industry was energetically insisted upon as founded on immemorial practice.

Besides Sweden and Norway have never recognized the three-mile limit as the confines of their territorial waters. They have neither concluded nor acceded to any treaty consecrating that rule. By their municipal laws the limit has generally been fixed at one geographical mile, or one-fifteenth part of a degree of latitude, or four marine miles; no narrower limit having ever been adopted. In fact, in regard to this question of the fishing rights, so important to both of the united kingdoms, these limits have in many instances been found to be even too

narrow. As to this question and others therewith connected, I beg to refer to the communications presented by the Norwegian and Swedish members in the sittings of the Institut de Droit International in 1891 and 1892. I wish also concerning the subject which I have now very briefly treated, to refer, to the proceedings of the Conference of Hague, in 1892, (Marten's *Nouveau Recueil Général*, 11ème série, volume IX), containing the reasons why Sweden and Norway have not adhered to the Treaty of Hague.

The PRESIDENT.—I would beg the Counsel of both parties to keep in remembrance the observations of Mr. Gram if they are inclined to quote the example of the Norwegian Waters; but I wish to state once more very distinctly that the question of the definition of what are territorial waters is not before us, and it is not the intention of this Tribunal to express any opinion as to the definition of territorial waters.

Sir RICHARD WEBSTER.—It is only necessary, Mr. President, in acknowledging, so far as the Counsel of Great Britain are concerned, our appreciation of the courtesy of Mr. Gram with regard to the Memorandum he has been good enough to read to us which will no doubt appear upon the Notes of the Proceedings, for us to say it is exactly in accordance with the view which I understand the Attorney General to have expressed, and which I expressed a few days ago, in regard to this matter; that, knowing perfectly well the question of territorial waters was not before you, I merely stated, so far as my own reading and information went, the doctrine of territorial waters in Norway and Sweden had to be considered with reference to the special configuration of the coast. And I did not know, one way or the other, whether or not Norway had either adopted the three-mile limit or insisted upon a wider range. It is clear, from the Memorandum that the learned Arbitrator has been good enough to read to us, the view I expressed was in accordance with the contention of Norway; and, further than that, I would point out, for the reasons with which I was not acquainted,—the discussion at Hague,—it is clear that this matter has been treated specially by Norway and Sweden in connection with their claim. If we had been discussing the question of the claim of the United States to a territorial jurisdiction, which is for the purpose of their case disclaimed, similar considerations might have arisen; but they do not arise, as the whole of my learned friend's argument is based on other considerations, to which I shall have to call attention later on.

Before I conclude what I desire to say on the question of property I wish to supplement a few observations on the subject to which I referred, as a little doubt was thrown upon the accuracy of my information by Mr. Senator Morgan when I made my statement with regard to Japan. First he intimated that Shimonoseki Straits had been opened a good many years before; and second he thought I was not correctly informed in my suggestion that the United States relied upon treaty. I have obtained the most accurate information on the matter and in both those matters I may say my information was strictly accurate. The Shimonoseki Straits, and all the waters of Japan, had prior to 1854 been absolutely closed to foreigners for upwards of 250 years, the only persons who had any settlement there were the Dutch who had a small settlement. In 1854 a treaty of navigation and for the opening of certain ports was made by the United States,—and I only surmised this the other day, because I had not had the opportunity of looking it up,—the first treaty was made by the United States in 1854 and it was not till after that treaty that 14 other Powers including Great Britain and France came in in the year 1857 and 1858, and the right to navigate

the Shimonoseki Strait had been claimed by all the powers by virtue of these treaties and by no other claim so far as I have been able to ascertain.

The learned Senator was perfectly accurate in referring to its narrowness but he rather stated it against himself, because it is less than a mile wide in one place, and the opening at the other end, clear of the islands, is less than four miles, so that it would have been difficult unless there had been some immemorial usage or some Treaty, for any nation such as Great Britain or France to have claimed a right of navigating in such waters. The Treaty was in fact concluded with the Shogun, and when the authority of the Emperor was restored it was not considered necessary to ratify again the Treaties. The only alteration was that in the case of Great Britain an Order in Council was issued substituting the name of the Emperor for the name of the Shogun; and when the disturbance by Prince Choshiu arose all the Powers combined, as I stated on the last occasion, and expressed their intention in identic memoranda to aid the then Government of Japan in putting down the interference of the rebellious prince Choshiu who was purporting to interfere, and in fact interfering, with the rights of navigating under those Treaties. I mention the matter now as I was, of course, anxious to look up any point as to which there was a lingering doubt in the mind of the Tribunal. I have ascertained those facts, and I need not say that all the information in my possession is at the disposal of any of the members of the Tribunal.

Senator MORGAN.—Well Sir Richard, I think it only right to say I have that Treaty of 1854 before me, and the United States have the right, under Article 2 to enter the ports of Simoda and Nagasaki and the port of Hakodadi, which I think is not on the straits of Shimonoseki. Those are the only ports they had the right to enter.

Sir RICHARD WEBSTER.—Is not that the Treaty with the favored nation clause in it?

Senator MORGAN.—You spoke of a Treaty with the United States in 1854, by which this strait was opened to the commerce of the world. I do not find that.

Sir RICHARD WEBSTER.—I think I said supplemented by the other Treaties under which the other Powers came in. It will be found that prior to that Treaty of 1854 those Straits were closed, and they remained open from 1854 till Prince Choshiu attempted to close them in 1864 as I mentioned the other day.

Senator MORGAN.—I meant to state the attitude of the United States Government towards that country—they claimed no Treaty right of going through the Straits of Shimonoseki at all. They claimed it on the ground that it was part of the high sea, because it was a strait connecting two great seas—the Sea of Japan on the south, and the Yellow Sea, I think it was, or the Sea of Corea on the north.

Sir RICHARD WEBSTER.—Well, Mr. President, I must not appear to enter into a controversy with the learned Senator, but I looked at the identic notes that were signed in the year referred to, and I can only say I believe it will be found that the United States claim was founded on Treaty. It seems to me sufficient for my purpose to call attention to that, and as I cannot say that my information as to the facts accords with what the learned Senator says, I have performed my duty in calling the attention of the Tribunal to what I understand to be those facts.

Now, Mr. President, I had practically concluded what I desire to say on the question of property at the sitting of the Tribunal on Friday last, but I presume I may be possibly expected to make one or two

observations applicable, so to speak, to this particular tribe of animals, the seals. I do not wish to add anything to the general description of them given by my learned friend, the Attorney General. I confess I was somewhat surprised in reading through the argument of Mr. Coudert, and the passage I refer to will be found at page 594 of the revised print before the Tribunal, when he stated that seals were only amphibious as the result of education. It struck me as a somewhat strained view. We know on the evidence that although young seals would be drowned if they were allowed to remain in the water too long, that is to say, that they cannot sustain themselves in the water during the first years of their birth any more than birds can fly when they are first hatched——

Lord HANNEN.—You used the word "years". I suppose you would say "months".

Sir RICHARD WEBSTER.—I ought to have said "days" of their birth any more than birds can fly; but we know that the instinct is there, for there is abundant evidence that pup seals have swum when in the water. I mention this to show that the argument of the United States has gone to very remarkable lengths when it leads my learned friend to suggest that the amphibious nature of the seals is only the result of education.

I wish to say a word on that which both my learned friends, Mr. Carter and Mr. Coudert, regarded as of importance,—the question of intermingling; and certainly, from a most careful view of this evidence, I say he will be a very bold man who would suggest that these seals did not intermingle, whether you take the evidence of the United States alone or whether you take the body of evidence on both sides.

I will remind you in a few moments of one or two matters which bear directly upon that. You will remember that my learned friend, the Attorney General, read to the Tribunal extracts from the evidence of the fur merchants, showing the existence in the Alaska catch of skins which could not be distinguished from the Commander and Copper Island skins, and in the Commander and Copper Island catch of skins which could not be distinguished from the Alaskan. He further read to the Tribunal evidence to show that in the same catches there are also skins in the Alaska and Copper Islands respectively which practically show interbreeding. I desire to supplement that evidence with one or two observations, directing the attention of the Tribunal to two or three matters in the same connection. First, I should like to tell the Tribunal that there are no less than 32 Furriers of independent position, many of them giving evidence for the United States, to many of whom my learned friend, Mr. Coudert, appealed as being witnesses of impartiality and integrity,—there are 32 witnesses, who will be found on pages 238 to 251 of the 2nd volume of the British Counter Case, who speak to the finding of these skins, as I have said, indistinguishable among the Alaskan catch from the Copper and Commander Island catch. Mr. Coudert felt that that would be important evidence, for, on page 618 of the Revised Print, he said:

> But upon this you will observe that there is not one single witness who will testify that he ever found a skin which he would call a Copper skin, in a consignment of Alaskan skins.

I do not, of course, want to prove my learned friend to be in the wrong, because it was a matter to which perhaps he had not had his attention sufficiently directed to; but so far from there not being a single

witness, there are that number of witnesses to which I have referred, and many of them (some 15 or 20) state the actual percentage or extent to which they think those skins occur.

Now, Sir, there is another body of testimony to which I desire, for a few moments, to direct the attention of the Tribunal—that is the evidence of no less than 57 witnesses who having sailed across Behring Sea, and having sailed across the Pacific Ocean south of the Aleutian Islands, state they have seen on a variety of voyages, at a variety of latitudes, and a variety of positions, practically continuously scattered seals across the sea. Well, Sir, of course it may be true that this kind of evidence is to be wholly disregarded, but I would ask the Tribunal first to consider for a moment what the probabilities of the matter are. That large masses of seals do go to the Commander Islands, do go to the Pribilof Islands, is of course plain. It is stated in the first instance by the British Commissioners, and recognized by every one who has investigated this matter; but when they are on the sea they must, to a large extent, be influenced by what is the actual position of the shoals of fish upon which they feed.

It is now plain from the evidence of the United States witnesses, as well as ours, that the seals feed largely on herrings cod salmon and on other fish—that it is not a fact that they feed solely upon squid or solely upon those animals or fish which would be found on the surface Therefore that these shoals of fish do shift, is spoken to by many witnesses, and as one would expect from one's general knowledge of natural history; you have therefore the testimony to be found summarized in pages 23 to 27 of the 2nd volume of the Appendix to the British Counter Case. You will find the evidence of 57 witnesses who, sailing across Behring Sea at all times of the summer—after May—sailing across the North Pacific Ocean, even in months which range over a longer period, have found these seals in thin scattered numbers going one or two at a time, or three or four at a time, practically the whole way over. But Mr. President let us for a moment consider what the United States evidence shows upon this matter, because really looked at fairly, and without an attempt to contradict what may be said in support of this theory, I shall submit to this Tribunal that it disproves altogether the theory of nonintermingling. There is the testimony of a witness at page 215 of the 2nd volume of Appendix to the United States Case. His name is Prokopief, and I will just tell you what he proves. Would it be troubling the Tribunal too much to ask them just to open map n° 1 of the United States—I mean the map of Behring Sea and the North Pacific. Just a little to the south-east of the end of the line of demarcation, you will see the Island of Attu. Just to the right of that, you will see the Island of Semichi, and then, a little further about an inch on the map which represents 150 miles to the right, you will see Amchitka. Now this witness says he has seen seals constantly as far as Amchitka and that he has seen them in batches between Attu and Agattu; that he has seen them 30 miles east of the Semichi Islands; so that, if you took the evidence of this gentleman Prokopief, and assume it to be (as I will assume it to be) perfectly honest, the limit to which he reduces the zone where no scattered seals are to be seen is 140 miles.

The zone or the space between which he says he finds there are seals is 140 miles. Now will the Tribunal consider for a moment what the problem is—and bring to bear their general knowledge on the evidence?

:t is admitted that seals have come from the Pribilof Islands down Amchitka. That will be a distance, roughly, of between 500 or 600 .es. The distance from the nearest of the Pribilof Islands to the :utian Islands is 182 miles. It is put by some witnesses as 200 miles; ; I will take the smallest distance, 182. From the Pribiloffs to ıchitka you will see, roughly, is a little more than double that dis- ıce; that would be between 400 and 500 miles however, the seals are ›posed to have come and probably have come. Of course, if the ls have crossed over the 30 miles, so much then of intermingling is ›ved at once; but the seals are supposed to have come from the mmander Islands down, 30 miles east of Semichi. As far as I can ge by my eye, that again would be about 250 miles, I should say— 'haps rather more, 300. I will show presently that seals have also ›n found right up into Behring Sea near Behring Straits. We know ıy have been found all along these Aleutian Islands from time to ıe, and I will also remind you they have been found spread out oss *these* seas. Now I want to ask you upon what reasoning—upon at line of thought is it to be suggested that having gone the 500 es—having gone the distance which would indicate that they are ·ing about—they do not pass over the 140 miles? What magic is ıre in that 140 miles, it being the strongest corroboration of the t which is sworn to by upwards of 30 independent witnesses, that › skins are, in fact, found identical in the two consignments, and also m to partake to a great extent of one character and to a great ent of the other. Upon this, let me simply mention a subject which o not wish to elaborate at length, for reasons which the Tribunal l, I am sure, appreciate.

Mr. PHELPS.—I beg my friend's pardon, for interrupting him, but I nk, if he will kindly read the evidence of this witness which he is ›ting he will perceive that he has not understood him quite correctly.

General FOSTER.—The first paragraph—that is all.

Sir RICHARD WEBSTER.—I will read the whole of it. He says:

am a hunter of the sea otter and blue fox and have lived in this vicinity all my . I hunt about Attu, Semichi Islands. Have never hunted nor killed a fur-seal. · seals do not regularly frequent these regions and I have seen none but a few ttering ones in twenty years. Thirty years ago, when the Russians controlled se islands, I used to see a few medium sized fur seals, on in the summer, generally June, travelling to the north, I think; for the Commander Islands.

Now, observe that: from the Amchitka Island down to the north- st,—that is, going away over the very branch of the sea in question, ıis opinion is right,—from that Island down away to the north-west, hink, to the Commander Islands.

Then he goes on to say:

he farthest east I have ever observed them was about 30 miles east of the Semi- Islands; do not think those going to the Commander Islands ever go farther east n that. Those most seen in former times were generally feeding and sleeping nt the kelp patches between Attu and Agattu, and the Semichi Islands, where mackerel abounds.

We know the mackerel are about the most fleeting fish there are. en he says:

hey decreased in numbers constantly, and now are only seen on very rare asions.

Whether I misrepresented—I am sure my friend does not mean to · I misrepresented—whether I misappreciated that evidence, I will ve the minds of the Tribunal to judge.

General FOSTER.—He does not say that the Pribilof Island seals came to that island.

Sir RICHARD WEBSTER.—I beg my friend's pardon. I see General Foster's point. It is better for me—but I do not want to argue this case on that theory—if those were only Commander Island seals, because he is speaking of the island of Amchitka. I can prove beyond all question, on the evidence, that the Pribilof Islands seals go and are found—in fact that is the United States Case—all along the north of the Aleutian Islands in Behring Sea. I say that to come to the conclusion that seals do not pass across 140 miles of sea, when they have traversed hundreds of miles, as much at least as 500 or 600 miles, and do traverse thousands of miles, is a conclusion which, except upon overwhelming testimony, the Court, I submit, will not adopt; reminding the Court that the seals from both Islands are the same species. There is no distinction between the animals. Any distinction in the furs is due to the climatic conditions, and possibly the curing conditions of the Pribilof Islands and the Commander Islands respectively; and Mr. Senator Morgan, when Mr. Coudert was arguing, stated at page 638, that the feeding grounds shifted—could not be located—and that, therefore, it was not possible to define the exact place where the seals might be one year, as with another.

Senator MORGAN.—I only asked the question.

Sir RICHARD WEBSTER.—I am much obliged, Sir, I understand. But Mr. President, will you look at the evidence of Captain Hooper? It will be found at page 216 of the American Counter Case. Captain Hooper found the seals in large numbers 300 miles west of the islands. It is no question of females—it is the question of finding seals in large numbers 300 miles to the west. He says:

During the run of 400 miles from Lat. 58° 22′ N., Long. 177° 42′ W., to Lat. 55° 38′ N., Long. 174° 23′ W., no seals were observed, although a careful look out for them was kept at all times.

Numerous seals having been found in these latitudes at a distance of 300 miles I infer that the western limit of the range of the Pribilof herd of seals is between two and three hundred miles from the islands and that the herds from the Pribilof and Commander groups of islands do not mingle.

I ask why when numerous seals are found at a distance of 300 miles, it shall from that be inferred that the western limit is between 200 and 300 miles? It is a difficult thing quite to appreciate. I am not unduly or unfairly criticising Captain Hooper's evidence but I point to numbers of seals having been found at a distance of 300 miles from the Pribiloff Islands—I am content to show that those animals, speaking of them as scattered animals—not as thick, dense flocks of them round the Pribiloff Islands—do travel a considerable distance, and again I say: What argument is there which is conclusive; or which you can say is found in any way sufficiently powerful, to induce you to come to the belief that they do not travel that intermediate 140 miles which is suggested to be the zone of separation between the two herds? I am not now, Mr. President, criticising this matter at length. I shall have to deal with it at length when I touch the question of regulations, and I shall then venture to urge before this Tribunal that the opinion of the British Commissioners is completely justified by the evidence subsequently taken. There is a very convenient summary of the evidence upon this matter at pages 23 and 24 of the Supplementary Report of the British commissioners. I am only using this as a part of my argument in order to show what is the existing state of the evidence with regard to the distances to which the seals approach one another. I will begin to read from the bottom of page 23.

In our previous report, as the existence of a certain amount of intermingling had never been questioned, it was not considered necessary to note in detail the evidence and the observations upon which the general statements made were based, but in conjunction with the information since obtained this becomes more important.

Now this is referring to the information they had when they made their Report stating there was intermingling. It goes on:

This information consisted, in the first place, of statements by pelagic sealers to the effect that, when crossing Behring Sea from the eastern to the western side, fur seals were frequently seen by them in all longitudes; secondly, of our own observations and of enquiries locally made along the Aleutian Chain.

My friends do not, of course, dispute the accuracy of facts actually spoken to by Dr. Dawson and Sir George Baden Powell.

Mr. PHELPS.—We very much dispute the accuracy of facts which are brought into this Supplementary Report that we had never heard of before, and we did not understand the decision of the Tribunal to make them evidence. We should contend they are not.

Mr. Justice HARLAN.—Sir Richard only adopts them as part of his argument, he said.

Sir RICHARD WEBSTER.—I am distinctly in accordance with the decision of the Tribunal.

Mr. PHELPS.—I understood my friend to say he was referring to the subsequent information obtained by these gentlemen.

Sir RICHARD WEBSTER.—My friend, Mr. Phelps, misunderstood me. I was referring to what the gentlemen themselves observed in the year 1891, which they had not previously stated in their report, because they did not understand the matter to be questioned. What has been ascertained since is in evidence in the Counter Case. It goes on:

While running to the westward, north of, but near to, the line of the Aleutian Islands, though the circumstances were often unfavourable for sighting seals, and long distances were passed by night, seals were actually seen by us approximately in the following positions:

August 25th.—North of Amukhta Islands, longitude 170° West.

August 25th.—North of Amlia Island, longitude 173° West.

That is going towards the West, of course: they are west longitude from Greenwich. Then it goes on:

August 28th—Near Attu Island, longitude 173° East (one seal).

August 30th—Midway between Attu and Commander Islands, longitude 171° East.

Further to the north, in the vicinity of the 60th parallel of latitude, occasional seals were met with at sea by Her Majesty's ship "Nymphe", and by ourselves in the month of September as far to the westward as 174° 30′ West.

We also ascertained from Mr. Grebnitsky, Superintendent of the Commander Islands, that fur seals had been seen in 1880, 1886, and 1887, by Russian cruisers when shaping a course from these islands to Indian Point, as far north as the 60th parallel, and at about the intersection of this parallel with the 180th meridian. The position thus defined is within about 180 miles of that in which we ourselves saw the first seals at sea in approaching the Pribiloff Islands from the northward.

Information gathered on this subject in the Aleutian Islands, in 1891, may be thus summarized.

Mr. PHELPS.—Pardon me, I think myself this question should be determined now. It is a question that we debated at so great a length before the principal hearing commenced—whether these British Commissioners could come in, pending the argument, and, by a new Report, not provided for by the Treaty, and which we have had no opportunity of seeing, much less to answer, add to those facts which are to be considered as evidence before this Tribunal.

We did not understand the decision of this Tribunal—we may have misunderstood it—to be that facts of this character became evidence in the case. We understood the decision to be that the argument of

the British Commissioners in support of their previous conclusions might be adopted by my learned friends as part of their argument, and, to that we had no objection whatever, but here my friend is reading new and additional statements of fact, which are either evidence or else they are utterly totally immaterial. We object to those being considered as a part of the evidence in this case.

Sir RICHARD WEBSTER.—I only desire to say that I propose to read (in strict accordance with the decision of the Tribunal) this summary of the evidence referred to as obtained by them in 1891, and all the evidence in 1892 (which is in the Counter Case) as a part of my argument. I understood that to be distinctly in accordance with the decision of the Tribunal, but I only wish to say—I am not going to argue the matter at greater length—that if the Tribunal give me the slightest indication—

Mr. PHELPS.—Might I ask my friend where this statement of Grebnitsky of what he gathered from the Russian cruisers is to be found except there?

Sir RICHARD WEBSTER.—I think my learned friend, Mr. Phelps, while Mr. Williams was speaking to him, was not paying attention to me. I stated that that was evidence obtained by the British Commissioners in the year 1891, upon which they made their statement. I did not say that that was in the appendix.

Mr. PHELPS.—My question was whether the evidence upon which they base this statement is to be found in this case anywhere, or whether it is supplied in support of a statement which we claim to have disputed.

Sir RICHARD WEBSTER.—It is found in the statement made by the Commissioners themselves.

Lord HANNEN.—Where is it to be found?

Sir RICHARD WEBSTER.—As far as I know it is a statement made by the Commissioners.

Lord HANNEN.—Where is that statement to be found?

Sir RICHARD WEBSTER.—At page 24.

Lord HANNEN.—Of the Supplemental Report?

Sir RICHARD WEBSTER.—Yes.

Mr. CARTER.—And no where else.

Lord HANNEN.—Mr. Phelps was trying to ascertain where it appeared upon the record. You say in the Supplemental Report.

Sir RICHARD WEBSTER.—It did not appear before and the report says so.

Lord HANNEN.—It is the only evidence of the statement.

Sir RICHARD WEBSTER.—The statement appeared that there was intermingling—I will refer to that in a moment.

In the original report the British Commissioners stated that in their opinion the two herds intermingled; they had not stated the evidence and they proceeded to say this:

> In our previous report as the existence of a certain amount of intermingling had never been questioned, it was not considered necessary to note in detail the evidence and the observations upon which the general statements made were based.

Lord HANNEN.—Well, you might adopt that into your argument—that that was the reason why they did it. Now what is the next statement?

Sir RICHARD WEBSTER.—The next statement is this—that they now state what was the information that they had obtained in 1891 upon which they drew their conclusion, they having had no reason to state it before, because rightly or wrongly they did not think this matter would

e disputed, and that is, as I understand, (of course I am entirely in he hands of the Tribunal with regard to this matter), a statement by he Commissioners in exactly the same manner as that which was tated in their original report, not of course controlled by rules of evi- lence any more than the statement of the United States Commissioners, ut a statement of evidence they had before them from which they lrew their conclusions. The rest of the matter refers to that which is n evidence. What I was reading when Mr. Phelps interposed was he statement by the Commissioners of what they learned from Mr. Grebnitsky.

Mr. CARTER.—The position of the learned counsel seems to be this: hat if there is any matter of fact in the possession of the British Com- nissioners at the time they drew their original Report, which matters f fact are not contained in it and which are in the nature of evidence, hat they may now introduce that evidence of these matters of fact, and for the reason that they were not then thought to be material. The point is, that it is introducing *new* evidence, and the suggestion that it was omitted by them at the time, because they did not think it to be material, does not detract from the fact that it is still *new* evidence, and that was excluded by this Tribunal, as we understood, when we debated upon the question of the introduction of this report.

Sir JOHN THOMPSON.—It was not excluded.

Mr. CARTER.—It was excluded as evidence, and was allowed to be adopted by way of argument.

Sir JOHN THOMPSON.—We reserved our decision as to whether it hould be received as evidence.

Mr. CARTER.—At all events it was not admitted.

Sir JOHN THOMPSON.—It was not received.

Mr. CARTER.—If the question still remains open, we make objection now.

Lord HANNEN.—Were you going to add anything, Sir Richard?

Sir RICHARD WEBSTER.—I was going to say this. As, of course, his matter is of more importance upon the question of Regulations han it is upon this matter—but for the introduction of it by Mr. Coudert I do not know that I should have referred to it—I was going o read the decision of the Tribunal. I am reading now from page 192 f the revised report.

It is ordered that the document entitled a supplementary Report of the British Behring Sea Commissioners, dated January 31st 1893 and signed by George Baden-Powell and George M. Dawson and delivered to the individual Arbitrators by the Agent of Her Britannic Majesty on the 25th day of March 1893, and which contains criticism of, or argument upon, the evidence in the documents and papers previously delivered to the Arbitrators, be not now received, with liberty, however, to Counsel o adopt such document, dated January 31st 1893, as part of their oral argument; if hey deem proper.

The question as to the admissibility of the documents or any of them, constituting he appendices attached to the said document of January 31st 1893, is reserved for urther consideration.

I have not referred at present—I am not going to refer to—any ppendices, but solely to the statement made by the Commissioners, entlemen of repute—as to the grounds upon which they made the tatement which I referred to in their original report. I do not like to nvolve myself in matters of discussion and I submit I am within my ight. Of course I have other important matters to bring before the Tribunal, and unless the Tribunal wished to adjourn formally to con- ider it, I would rather postpone this matter for the present.

The PRESIDENT.—We must reconsider the matter at any rate since you intend to use those statements in your arguments on Regulations.

Sir RICHARD WEBSTER.—Certainly.

Mr. Justice HARLAN.—You postpone it until that time, do you?

Sir RICHARD WEBSTER.—Upon the least intimation from the Tribunal, I should do so.

Lord HANNEN.—I am very anxious, Mr. Phelps, so far as I can, always to meet your views. Would it be objectionable if Sir Richard referred to it, you having noted the fact that the evidence was not contained in anything which preceded the supplementary Report? We bearing that in mind, would it inconvenience you that Sir Richard Webster should use it, with the comment made by you upon it?

Mr. PHELPS.—It is not a question of convenience if the Tribunal please, at all—it is a question of right. The objection that we make is: That neither under this Treaty, nor under the procedure of any Tribunal that ever sat under the forms of law, is it allowable for a party after the case is made up, the written argument complete, the oral argument begun, to come in with a statement of new facts and new evidence that is to be regarded by the Tribunal in determining the issues of fact.

Lord HANNEN.—I had that fully in my mind. You have answered by saying you stand on your strict rights, and do not treat it as a matter of convenience.

Mr. PHELPS.—As a matter of course if it is not to be regarded, it need not be read. If it is to be regarded, we are defenceless as far as that is concerned.

The PRESIDENT.—You object to the facts being stated, because you have not had time or the capacity to control them.

Mr. PHELPS.—Certainly.

Sir RICHARD WEBSTER.—Mr. Phelps' observation shows that he really has not apprehended my position in the least. In paragraphs 452 and 456 of the original report the British Commissioners state the fact that in their opinion, (rightly or wrongly) they come to the conclusion that there was intermingling.

Mr. Justice HARLAN.—That there *was?*

Sir RICHARD WEBSTER.—Yes—intermingling. They did not state the information they had obtained with regard to the matter. They did state an amount of other information they had obtained, and the United States Commissioners in their report equally state that. In this supplementary Report all they do is to give to the Tribunal the information they then had upon which they formed the conclusion which the Tribunal can criticise.

Lord HANNEN.—That raises the question of what Mr. Phelps insists upon, whether or not it is not fresh evidence.

Sir RICHARD WEBSTER.—Of course I do not want to argue this again now—this was the whole matter we discussed on the previous occasion. It is not a question of evidence—it is a question of information before the Tribunal with regard to this question, depending partly upon the conclusions people drew from certain facts.

Sir JOHN THOMPSON.—The British contention at that time only was that this was admissible and capable of being used *quoad* Regulations, and you have not come to that stage of your argument yet.

Sir RICHARD WEBSTER.—Really, one only regrets possibly that one is involved in a contention which may be thought to introduce questions of difficulty to a greater extent than it does. I am willing from the point of view of property argument not to refer to this any more; but I must,

in adopting that line, be understood distinctly as reserving my position. I do not pass from it in consequence of what my learned friend, Mr. Phelps, has said in regard to this matter, because he has, with deference, endeavoured to put us in a position that we have never assumed, and which we ought not to be supposed to have taken.

So far as I am concerned, if the Tribunal prefer that the matter should be discussed at a later stage, it does not bear directly on the point I am now arguing. There is abundant evidence without this, before the Tribunal, to enable them to come to the conclusion to which I invite them.

The PRESIDENT.—Then, Sir Richard, you are willing to pass over these facts till you come to Regulations?

Sir RICHARD WEBSTER.—Certainly, Sir.

The PRESIDENT.—Very well.

Sir RICHARD WEBSTER.—Then there is one argument to which, for obvious reasons, the Tribunal will not expect me to refer at any length; and that is, the question of the fertilisation of the female at sea. All I desire to say is that I hope they will be good enough to take a note of pages 33 and 34 of the British Counter Case, Appendix 2, where will be found evidence of between 20 and 30 witnesses. The fact, for what it is worth, is abundantly proved. There is this further matter to which I ask the particular attention of the Tribunal, that, upon the evidence on both sides, the United States and ours, there is no evidence of virgin cows ever having been seen on the Island at all, and it has a remarkable bearing on this branch of the case. But, of course, for obvious reasons, I do not desire to elaborate that matter further now; I may have to call attention to it later on.

Sir, Mr. Coudert told you that the branding of these pups was a matter of perfect ease, could be done without the slightest difficulty, and that that fact was strong evidence of the property rights of the United States. Mr. President, I do not doubt that this Tribunal have read many passages in these affidavits, so that they have a very intimate knowledge of the evidence; and I am willing to put this in the broadest possible way. It has never been done, except in the instance of the hundred seals that had their ears cut in order to see whether they would come back to the same rookeries, with the result, as the Attorney General reminded you, that none came to the same rookery: some were found in different parts of the Island, and some were found on the other Island of St. George. When you remember the evidence as to the timidity of these animals, that, if the rookeries are disturbed, the seals go with such haste (this is on the evidence of both sides) to the sea, that they trample over the young pups and kill them,—when you know that the evidence is that, upon any person alarming them, they immediately take to the water and no longer remain upon the land; when you further find that upon the evidence of Mr. Stanley Brown for the United States and the evidence of Mr. Macoun and other witnesses, to whom later on I shall have to call attention, the pups in 3 or 4 weeks from their birth spread themselves over miles of these Islands, I think the suggestion made to you that a ground for awarding property is that these seals might be branded is somewhat extravagant. I use, and desire to use, no stronger expression than that.

Now, I would point out that if they were marked or branded, it would make no difference on the question of property. If I mark my pheasants, those actually hatched by me, and reared by me, and fed by me, and they fly out to other people's land, they have a perfect right to shoot them. Suppose I should mark every young rabbit that could be caught in the same way. If a rabbit went out on my neighbour's property, he

would have a right to shoot it. The only case, as I endeavoured to point out to the Tribunal on the last occasion, in which property is given in such animals, is when possession is taken; and possession is not taken by marking a wild animal and letting it go.

Sir, some of my learned friends seem to think, from this point of view, there was some analogy between the seals and the cattle on the plains of America. That was fully dealt with by the Attorney General; but perhaps I may be allowed to remind you that the whole principle upon which the legislation (for it is legislation) has proceeded in the United States, has been that the animals could be rounded up at any time and were, in fact, rounded up from year to year; and, as the Attorney General reminded you, particular provisions as to marks were directed by Statute. I cannot better illustrate my meaning than by referring to an argument made by Senator Morgan when I was arguing this question of property the other day. He said you may not like to call it property; as long as the seal is on the Islands, the United States or the lessees have absolute dominion over them. I should not agree that perhaps "dominion" was the strictly accurate word to express the right or privilege of capturing. But I will accept it for the purpose of the argument. Did anyone ever hear of dominion extending beyond a kingdom; or of dominion extending beyond territory; and if it were a correct analogy to describe whatever power and rights the United States have over the seals while on the Islands or in territorial waters as being dominion, one wants no better illustration for showing that that dominion stops when the animal leaves the Island or the territorial waters and goes out on to the high seas? Therefore, I ask the Tribunal to come to the conclusion that from the point of view of any act which is supposed to be an equivalent of taking possession, no possession has ever been taken; and if in the case put to me the other day, that there is an attempt to take possession by driving the seals, with regard to all the seals that are not captured and killed the attempt fails or is abandoned; but nothing equivalent, either in law or in fact, to the taking of possession in any way occurs.

In this connection, I was asked, or my learned friend the Attorney General was asked, also I think by Senator Morgan with regard to the question of whether there was not some ground for the theory that all game belonged to the State—belonged in England to the King: and I presume the Senator would endeavour to draw the analogy that it belonged in the United States to the State. Sir, I am not surprised at that question being put; and, although it is of purely academic interest, perhaps I may be allowed in one or two sentences to give my answer in regard to that matter. Under the old Forest Laws, the King had the exclusive privilege of killing game in royal forests. If the game wandered from the forests, anyone had a right to kill them; and, although there were writers, and among them Sir William Blackstone, who expressed the view that the origin of the Game Laws originally was the property in wild animals being vested in the King, the theory was exposed in a very learned note by a lawyer of the name of Christian,—Christian's edition of Blackstone,—and by perhaps the greatest authority on this question, Mr. Chitty who wrote on the "Prerogatives of the Crown" in the work to which my learned friend the Attorney General called attention; and it is the fact, that there is no case and no decision which in any way limited,—no instance either criminal or civil in which a party has been sued or prosecuted on behalf of the King for taking game unless he took it within some privileged place. On the contrary, it is laid down that no individual can be indicted at Common Law for stealing animals

feræ naturæ unless reclaimed; and the books of authority,—I have investigated this matter, I may say, with as much care as I could bestow upon it,—repeat more than once that there are various authorities showing that, if a man drive a stag out of the forest, then he would be liable for having, interfered with the King's forest; but if the stag comes out of the forest upon his own land or territory, he has a right to kill it.

Again, stating it as I have said more than once, referring to the authority of a case in the 11th Coke's Report, the Case of Monopolies, at page 87, everyone on his own land may use them, that is hunting and hawking, at his pleasure, without any restraint to be made unless by Parliament, as appears by certain Statutes that are there cited. I, therefore in deference to a view expressed by a member of the Tribunal, have to state respectfully before this Tribunal, and in that I shall be corrected by those skilled in English Law whom I address, that for years it has been the recognized law of Great Britain, certainly for a century or more, that the King has no greater property in game other than the royal birds, such as swans, and the royal fish, such as sturgeon, than a subject has in respect of game upon his own land.

Now, Mr. President, I wish to say a word about the theory that, apart from property, the United States have equally a right of interfering to protect their industry. Sir, when my learned friend, the Attorney General was addressing you upon this matter, you pointed out to him that the argument of my learned friend, Mr. Phelps, and the passage from the Argument which he read, was only an argument based upon the assumption that there was no property in the seals. It is to that part of the Case that the observations which I shall now address to the Court are directed. It is extremely important that I should enforce upon the Tribunal this view, namely, that my learned friend, Mr. Carter in his oral argument, Mr. Phelps, in his argument to which he has already told you he adheres, and to which he courteously called our attention, and said that we must deal with it by anticipation, both those learned gentlemen assert that their right to protect—to take the steps which they did take in connexion with the British vessels, is independent of any possession, property, or ownership of the seals themselves. At page 136 of the written argument of my learned friend, Mr. Phelps, you will find this passage which I have no doubt is in your memory, but I will read it again.

> The case of the United States has thus far proceeded upon the ground of a national property in the seal herd itself. Let it now be assumed, for the purposes of the argument, that no such right of property is to be admitted, and that the seals are to be regarded, outside of territorial waters, as *feræ naturæ* in the full sense of that term. Let them be likened, if that be possible, to the fish whose birthplace and home are in the open sea, and which only approach the shores for the purpose of food at certain seasons, in such numbers as to render the fishing there productive.
>
> The question then remains, whether upon that hypothesis, the industry established and maintained by the United States Government on the Pribilof Islands, in the taking of the seals and the commerce that is based upon it, are open to be destroyed at the pleasure of citizens of Canada, by a method of pursuit outside the ordinary line of territorial jurisdiction, which must result in the extermination of the animals.

And at page 484 of Mr. Carter's speech, he in opening his argument on this part of the Case, said:

> I come now then to the other branch of the question of property namely, the property which the United States asserted in the industry carried on by them on the Pribilof Islands, irrespective of the question whether they have property in the seals or not.

Therefore, for the purpose of that to which I desire to direct the attention of the Tribunal, I am entitled to assume—nay, I must make the assumption made by my learned friends that no property exists, and

that they have no claim either to the seals or to the herd apart from the industry. May I state, first my submission of the law in regard to this matter, and then deal in detail to whatever extent I think necessary, without trespassing unduly upon the time of the Tribunal, with the arguments of my learned friend, Mr. Phelps, which appear in the written book. Apart, Sir, from a malicious act with the intent of injuring the person who is carrying on an industry, and done by a person who is not doing the act complained of himself for the purpose of his own trade, there is, so far as I know, by the law of no civilized country, no right of interference by the person whose trade is injured. I am putting it as I am sure my learned friends will admit, in the broadest way. I am not endeavouring to obtain any advantage from the fact that what the United States do is entirely done on the Islands and is in territorial waters. I say that whatever industry is carried on, if it be conceded, as for the purpose of this argument it must be conceded, that the animal itself is not the property of the United States; except in the case of what may be called wanton and malicious acts with the intent of injuring the person carrying on the trade, pursuit, or industry, no civilized country recognizes that any wrong is being done by the person who, in the course of carrying on his own business, interferes with or competes with, or, reduces, the profit earned by the person who makes the complaint.

Sir, it can be tested in a moment, and tested, I submit, almost exhaustively by one test. Can the right of the pelagic sealer depend upon the question of whether or not the industry is being carried on on the Islands? Is it not absolutely fatal to the United States contention as to their right of interferring with the particular act done by the pelagic sealer, if they are driven to admit that the pelagic sealer could kill the animal if the United States were not carrying on what they call the industry upon the Islands? Sir, legal rights cannot depend on any such contingencies, and to put only for the purpose of enforcing my argument one of the main positions taken by my learned friend, the Attorney General—suppose the trade did not pay; suppose the price of seal-skins in the market is such that the lessees do not care to renew their lease, and suppose that the United States as a Government do not go in for the catching and dressing of seal-skins, my learned friends cannot claim that the pelagic sealers would then be within their right: and therefore their position is this, that the determination of a particular individual to catch animals on land is in itself sufficient to turn an act at sea otherwise lawful into an unlawful act. Sir, I speak with great deference to any authority that my learned friend, Mr. Phelps, may cite when he comes to reply. If there are any new authorities, we shall, of course, have the privilege of dealing with them, but in his very learned and elaborate argument, and in the most interesting argument of my learned friend, Mr. Carter, there is not a trace of authority for such a proposition as that to which I am now directing attention. It does require authority and does require some principle which one can appreciate in order that it may find favour with such a Tribunal as this.

Now, what is the real ground, so to speak, of my learned friend, Mr. Phelps, contention? You will remember, Mr. President, that the United States in their Case give a long list of legislation by colonies and other countries, by which legislation certain restrictive measures have been taken with a view to the preservation of animals, or with a view to the prevention of the interference with individuals in their rights of taking animals. And you will remember that every one of those instances was examined by my learned friend, the Attorney General. They had been

examined in writing in the Counter Case; and in the Argument, the defect in the United States assumption in their original Case had been pointed out; notwithstanding that, in the exercise of his discretion, my learned friend Mr. Phelps adheres, and told us orally he adhered, to the contention which is put forward in his written Argument, namely, that these authorities show or afford some analogy of the justification of the United States upon the ground that these protective or defensive measures are supposed to be legitimate.

Now, how is that put forward? I desire to read three paragraphs in order that you may thoroughly appreciate the particular part of the argument to which I am going to address myself this afternoon. The first one is at page 130 of the United States Counter Case. This is, of course, after the British Case had been seen, and the Argument of the British Case considered.

The United States charge that each and all of the vessels when so seized were engaged in the hunting of fur-seals in the waters of Behring Sea in violation of the statutes of the United States, and that such seizures were made in accordance with the laws of the United States enacted for the protection of their property interest in the fur-seals which frequent Behring Sea and breed only upon the Pribilof Islands, which Islands are part of the territory of the United States; and that the acts of the crews and owners of these vessels in hunting and catching seals were such as, if permitted, would exterminate the Alaskan seal herd and thereby destroy an article of commerce valuable to all civilized nations.

Sir, to take the Argument of my learned friend, Mr. Phelps, from which I will read a passage in a moment, I certainly should have thought that that meant to assert that the United States Government had got the right of making these laws, so that they would extend over the waters in which the British vessels were actually sealing. But, to be perfectly fair, I think that that would be scarcely just after the very pointed way in which the case is put by my learned friend, Mr. Phelps. If you will be good enough to refer to two passages in the United States Argument, particularly at pages 170 and 171, you will see the way in which my learned friend, Mr. Phelps, proposes to avoid the difficulty which would arise if the language of page 130 which I have just read were taken according to its natural meaning.

An effort is made in the British Counter Case to diminish the force of the various statutes, regulations and decrees above cited, by the suggestions that they only take effect within the municipal jurisdiction of the countries where they are promulgated, and upon the citizens of those countries outside the territorial limits of such jurisdiction. In their strictly legal character as statutes, this is true. No authority need have been produced on that point. But the distinction has already been pointed out, which attends the operation of such enactments for such purposes. Within the territory where they prevail, and upon its subjects, they are binding as statutes, whether reasonable and necessary or not. Without, they become defensive regulations, which if they are reasonable and necessary for the defence of a national interest or right, will be submitted to by other nations, and if not, may be enforced by the Government at its discretion.

If the words

"will be submitted to by other nations"

meant other nations may assent to them and then they become part of international law so far as those nations are concerned, I could have understood it; but I gathered, and it is really necessary for my learned friend Mr. Phelps' argument, that his contention is that the Statute, though municipal and though operating as a Statute upon the subjects or citizens of the country who owe allegiance to that State, is to be regarded as a defensive Regulation and may be enforced by the Government at its discretion against foreigners.

The same idea, Mr. President, is also expressed at an earlier page of Mr. Phelps' Argument, namely page 149, where he says:

> Statutes intended for such protection may, therefore, have effect as statutes within the jurisdiction, and as defensive regulations without it, if the Government choose so to enforce them, provided only that such enforcement is necessary for just defence, and that the regulations are reasonable for that purpose.

Now is there any foundation for this theory. I speak to lawyers; I speak to those members of this Tribunal all of them who of course have a very large experience of the grounds upon which the action of particular nations has been justified from time to time by the representatives of various nations. Now, Mr. President, so far as I know, and certainly so far as the instances given by the United States Government are concerned, there is no instance prior to this case in which it has ever been suggested that the writing down of a law on a municipal Statute-book has any effect outside the dominions of that country so far as foreigners are concerned. The cases in which foreigners have been affected by municipal statutes are, without exception, prior to this case, cases in which foreigners had gone within the dominions and broken the law, or were intending to go within the dominions and break the law.

Lord HANNEN.—So that you must add "or had immediately before broken the law."

Sir RICHARD WEBSTER.—That, of course, my Lord, is a further qualification. I was putting it a little more generally myself. I say that, of the authorities prior to this case, there is no trace of an authority for suggesting that a municipal statute has any operation—in fact I do not want it better admitted than in the language of my learned friend Mr. Phelps himself, to use his expression at page 171: "they have no authority".

My point is that, prior to the contention on behalf of the United States, there was no suggestion by any writer or by any Judge that a municipal Statute had any operation against foreigners, excepting in the case where the foreigner either had entered the country or the territorial waters, and broken the law there, or was intending to enter those waters or that territory and intending to break the law. In principle it would be indeed strange if international law was otherwise. I know not the actual number of nations in the world that legislate for their subjects now in some form of written legislation. If this theory of my learned friend, Mr. Phelps, is correct; by simply writing down in the Statute-book or whatever may be the form—in the Ukase if that be the expression for Russian legislation, at the present time, or whatever may be the name of the particular form of local municipal legislation which takes effect in a particular country—writing it down not in a language known to other nations—because it is a mere accident that in this case the two contending countries speak the same language—if this theory be worth anything, all the Russian municipal laws are defensive regulations to be put in force against foreigners upon the high seas, although they have never been communicated to foreigners and although they speak of course by their Statute-book, or by the statute in which it is expressed, simply and solely to the subjects.

My first broad criticism with regard to this contention is that it is inconsistent altogether with the principles that have affected the relations between nations, that the writing down of an enactment in the laws of the country can have any effect upon foreigners who do not intend to do anything, and do not, in fact, do anything within the territorial limits.

Senator MORGAN.—Sir Richard, before you read your authority, I would like to know what your position is about this.

Sir RICHARD WEBSTER.—Certainly, Sir.

Senator MORGAN.—In the exceptional cases you speak of, where a nation may exercise its authority beyond its territorial limits, is the authority when exercised the authority of the statute of such nation, or is it the authority of the international law?

Sir RICHARD WEBSTER.—It is the authority of the statute of the nation. It is the stretching the long arm of the law. I say, Sir, with great deference to the argument on the other side, that the true ground which has been recognized more than once is that either by express consent, or by acquiescence, as you put it the other day—for it may be by acquiescence—nations, sometimes one, sometimes more, have agreed to the arm of the municipal law being stretched in order to prevent a breach of its municipal law.

Senator MORGAN.—Then the question would be how far a nation may be tolerated in defending what it conceives to be its rights outside of its territorial limits?

Sir RICHARD WEBSTER.—I say a nation may be tolerated—I am only adopting your language for the moment—

Senator MORGAN.—Certainly.

Sir RICHARD WEBSTER.—A nation may be tolerated to any extent, if it chooses to say: I am going to make this a matter of war, and I am going to assert that which I can enforce by power.

But I am now dealing with the legal argument of my learned friend, Mr. Phelps. I am now dealing with the question which is submitted to you under Question five.

What right of protection had the United States at the time this Treaty was entered into, and at the time that the vessels were seized—what right exists by international law?

If Mr. Senator Morgan will let me postpone to the conclusion of my examination of my learned friend's authorities the consideration of the question that he has more than once hinted at, whether this Tribunal might not have some wider or more general jurisdiction, I would prefer to do so. I do not think I could make my meaning clear with regard to that matter until I have submitted, as accurately as I can, to this Tribunal what our contention is with regard to what I may call the express authorities to which Mr. Phelps refers.

Now, Sir, the expression "defensive regulations" occurs very rarely. On page 147 of the United States Argument, quoting from Chancellor Kent, the same edition that I quoted from the other day, pages 30 and 31, this citation is made:

> Considering the great extent of the line of the American coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of—

What?

> maritime jurisdiction.

Well, I think that the meaning appears perfectly plain from that language, taking the extract by itself. Chancellor Kent, dealing with the question, and arguing the question, of the three-mile limit, arguing the question of jurisdiction, properly so called, pointed out that for the purpose of fiscal and what he there calls defensive regulations, there was a fair claim to a liberal extension of maritime jurisdiction. If the passages immediately following that extract, and immediately succeeding it, are read—they amount to some two or three pages—it will be found that in the whole of that extract, in the whole of that discussion,

Chancellor Kent was dealing with the right of a nation to make municipal laws which should have an operation beyond the three miles, and never referred to the executive acts of a nation to be justified upon the principles to which you, Senator Morgan, referred me a moment ago; that he had not in his mind, and was not at that time in any way discussing or considering, those executive acts, the responsibility of which a nation will take upon itself, whether they be right or wrong, according to international law. He was discussing the legal question, and the legal question only, to what extent might a claim be fairly made to an extension of the three mile limit? I am going to point out, sir—I had it in my mind to mention it the other day—that this passage shows that similar ideas as have been expressed this morning by Mr. Gram, were really in the mind of Chancellor Kent when he was referring in the following words to the character of the waters over which such maritime jurisdiction should be extended:

It would not appear unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as for instance from Cape Ann to Cape Cod and from Nantucket to Montauk Point, and from that Point, to the Capes of the Delaware, and from the South Cape of Florida to the Mississippi.

Now, sir, Mr. Chancellor Kent may have been right or may have been wrong in the views that he was expressing with regard to claims, but the point of my present observation is, that, so far from that citation being any authority for the contention of Mr. Phelps, that the statute might be construed, and was to be construed, as being an executive act, to be put in force at the discretion of the Government, it is the contrary. A contrary inference is to be drawn, a contrary conclusion to be arrived at; because he is referring to the right of a nation to extend its maritime jurisdiction and to make its laws for fiscal and other defensive purposes.

I am led a little, perhaps, out of the line of thought I was pursuing, but still it will not be inconvenient if I at once call the attention of the Tribunal to some cases which lay down this principle distinctly.

Sir, in those authorities of which we have given the Tribunal and my friends prints, there is a judgment of the great Judge, Mr. Justice Story, in the case of the "Apollon", reported in 9th Wheaton, which I crave leave to read to the Tribunal, because it expresses the argument against the contention of Mr. Phelps, that these statutes might be regarded as defensive regulations to be put in force when and as a nation likes upon the high seas or anywhere else. For, be it observed that the necessity of my learned friend's argument compels him to contend that this right would extend to going even into other people's territory, if necessary, as a matter of right.

I do not know whether it would be troubling the Tribunal too much to ask them if they would kindly look at the report of the "Apollon." It is in the printed authorities handed in by the Attorney General. It is the third case, and begins at page five. The paper is headed "Behring Sea:—Authorities on Search, Seizure and Self defence":

The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be,

That is the American municipal laws—

they must always be restricted in construction to places and persons upon whom the Legislature have authority and jurisdiction. In the present case, Spain had an equal authority with the United States over the river St. Mary's. The attempt to

compel an entry of vessels, destined through those waters to Spanish territories, would be an usurpation of exclusive jurisdiction over all the navigation of the river. If our Government had a right to compel the entry at our Custom-house of a French ship in her transit, the same right existed to compel the entry of a Spanish ship. Such a pretension was never asserted; and it would be an unjust interpretation of our laws to give them a meaning so much at variance with the independence and sovereignty of foreign nations.

Then there is a passage that is not material upon this point. I have the report here.

But, even supposing for a moment that our laws had required an entry of the "Apollon" in her transit, does it follow that the power to arrest her was meant to be given after she had passed into the exclusive territory of a foreign nation? We think not. It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the law of nations. The arrest of the offending vessel must, therefore, be restrained to places where our jurisdiction is complete, to our own waters, or to the ocean, the common highway of all nations. It is said that there is a revenue jurisdiction which is distinct from the ordinary maritime jurisdiction over waters within the range of a cannon-shot from our shores. And the provisions in the Collection Act of 1799, which authorize a visitation of vessels within 4 leagues of our coasts, are referred to in proof of the assertion. But where is that right of visitation to be exercised? In a foreign territory in the exclusive jurisdiction of another Sovereign? Certainly not; for the very terms of the Act confine it to the ocean, where all nations have a common right, and exercise a common sovereignty. And over what vessels is this right of visitation to be exercised? By the very words of the act, over our own vessels, and over foreign vessels bound to our ports, and over no others. To have gone beyond this would have been an usurpation of exclusive sovereignty on the ocean, and an exercise of an universal right of search, a right which has never yet been acknowledged by other nations, and would be resisted by none with more pertinacity than by the Americans.

I need not read the rest of the judgment. It is equally in my favor but not so pointed. May I ask the Tribunal to consider the enunciation of the law there laid down by a Judge second to none in the history of lawyers of the world, Mr. Justice Story.

And it is, Sir, in accordance, so far as my research has enabled me to discover, with every other Judge and writer of authority, namely, that these statutes have only force, and are intended only to operate, against persons who are attempting to break or have broken the municipal law. I do not repeat the qualification which, for the purposes of accuracy, I should have included, which Lord Hannen was good enough to mention a few minutes ago, namely that even in the case of an actual breach of the municipal law, the breach must be recent, the pursuit must be hot. It is sufficient for my purpose to say that the cases in which these municipal statutes have ever been held of any authority at all are cases in which the foreigner is entering or has entered the territorial water with the intention of breaking the law.

Sir, the other correlative proposition may be stated, I believe, with as much clearness and with as much generality. I believe that in the whole history of diplomatic relations, in the whole history of complaints made by States in respect of acts which they thought were contrary to international law, though you will find many justifications on the ground of immediate and pressing danger, on the ground of the sudden emergency in which a nation has been placed, on the ground that they were willing to take the risk, having regard to the pressing danger, on the ground that persons in respect to whom the complaint was made had behaved so immorally and so unjustifiably that their cases ought not to be taken up by the complaining State to which they belonged, there is not a trace of a justification of any one of these acts upon the grounds now put forward by my learned friend Mr. Phelps.

Sir, of course it does not in any way weaken his argument, provided it be in accordance with recognized principles, that it should be for the first time asserted; but when, as I shall have to show you later on, it is in conflict with principles of international law, universally asserted and universally recognized, it is no small argument which my learned friends have to meet, that they are not able to point to a single case in which the action of a State complained of has been justified on the ground that it was carrying out the provisions of municipal statutes which were supposed to speak and intended to speak originally only as regards the nationals over which, of course, they had authority.

Therefore, Sir, though upon an argument based upon the past proceedings of five or six years negotiations between the United States and Great Britain, an argument based upon the fact that in its inception these vessels were seized because they had broken municipal statutes, the men were imprisoned, fined and turned adrift penniless, because they were supposed to be criminals, according to the municipal law of the United States, though in the inception that was the case, it may be said if the right existed, it can now be justified on other grounds. Possibly; but it does form a strong argument for our contention if we are able to point to the fact, that prior to the filing of this written Argument the suggestion that a municipal statute operates against all the world, as an authority which the world is bound to obey upon the ground that the State can enforce it on the high seas at its discretion is an argument which is absolutely new both in point of international law and, so far as I know, according to diplomatic relations.

The Tribunal here adjourned for a short time.

Sir RICHARD WEBSTER.—Mr. President, I mentioned that I had two other cases to which I wished to call attention in this connection, and one is merely to refer to a passage in the United States Argument, page 149, where Mr. Phelps having cited the case of the *Queen* v. *Keyn* says:

> The opinion of Chief Justice Marshall, and the language of Lord Cockburn above cited very clearly illustrate the distinction between a municipal statute and a defensive regulation.

If that is merely an expression of Mr. Phelps's opinion, I have no right to criticise it, but I must be allowed to say that if it is intended to be a statement that Chief Justice Cockburn ever recognized a municipal statute as being equivalent to a defensive regulation, or that he supported the view that the making of a statute was supposed to be an expression by a nation of an intention to do an executive act which the nation would undertake on its own responsibility, I appeal to the judgment in the *Queen* v. *Keyn*. There is not one word to support that view in the passage read by Mr. Carter, which will be found at page 79 of the report which I think the members of the Tribunal have seen in the pamphlet form—the authorized edition.

Chief Justice Cockburn was referring to legislation and to legislation only, and he says in terms:

> Hitherto legislation, so far as relates to foreigners in foreign ships in this part of the sea has been confined to the maintenance of neutral rights and obligations, the prevention of breaches of the revenue and fishery laws, and, under particular circumstances to cases of collision. In the two first, the legislation is altogether irrespective of the three-mile distance, being founded on a totally different principle, namely the right of a State to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws.

And in that passage, cited more than once by my friend Mr. Carter, and referred to in this passage in Mr. Phelps' argument, it will be found that there is no trace of foundation for the suggestion that the Statute

is to be construed as being otherwise than a Statute, convenient, useful, and intended to operate upon, and affect foreigners in the cases in which foreigners have become subject to municipal laws.

Now, Sir, the only other case I need mention in connection with this, is to repeat a criticism which I interlocutorily made with reference to the statement on page 150 of my friend's Argument that the judgment of the Supreme Court of the United States in the case of the "Sayward", supports this position.

My friend Mr. Phelps was good enough to mark for me some five or six pages of the authorized Report from which the Attorney General had read, in which Mr. Phelps said would be found the passages which he suggested indicated the view of the United States Courts upon this matter. The passage began at page 13, and ended at page 22. I have read and re-read that passage most carefully, and, speaking of this judgment as a judgment to which the world might look hereafter in investigating the question, I do not hesitate to say that except the suggestion that possibly a Court might not think itself justified in examining an executive act, there is not any passage that supports the view that a Municipal Statute is to be regarded as a defensive regulation. I felt it my duty to repeat this, because Mr. Phelps was good enough to shew me the passage upon which he relied. When he comes to reply, I ask the Court to judge between us by listening to any passages from the judgment he may read, and see whether there is any foundation for the suggestion that the United States Courts have ever said, directly or indirectly, that a Municipal Statute would be construed, as against foreigners, as a defensive regulation.

Now, Sir, the next group of authorities cited by my friend Mr. Phelps run from pages 152 to 155. They are such cases as the Amelia Island, the "Caroline" and the Appalachicola River, and they are either cases of war, or warlike operations. Again I have to observe—I am aware it is repetition, but it is necessary—that this is the first occasion when it has been contended that according to International law, there is no distinction between times of war and times of peace. We may be only students—some of us only have the right to speak as students—but I submit the merest student in International law is taught the broad distinction what are rights in time of peace and belligerent rights, and there is, so far as I know, no warrant for the argument or premise which lies at the root of my friends Mr. Phelps' argument, when he states that rights which have hitherto been regarded as belonging only to nations when they are in a state of belligerency are to be exercised as defensive regulations, or as executive acts of defence in time of peace. If that were to be the true view of the matter, a great deal of the learning which has been expended in drawing a distinction between rights of belligerents and rights in time of peace has been wasted, and thrown away. But I am obliged to deal, and do deal, with this argument, treating it with all the respect I can, but I am desirous of pointing out that from my reading and from my examination of the instances cited, they were, in every case, instances which a nation justified on the ground that it was either putting down a rebellion, or engaged in war, or that the acts it was performing were acts which it was justified in undertaking on the ground that marauders or robbers, were setting up either in the territory or in close proximity of the territory a hostile or marauding band. I need not do more than remind you that is no analogy to the case which we are discussing, assuming I am right the United States have no property in the seal or in the seal herd, and no right to prevent other persons from shooting, catching, or otherwise capturing the seal on the high seas.

Now I come to a part of the case to which very great importance was attached by my friend Mr. Phelps. I refer to the passages on pages 155 to 157, on the subject of Newfoundland, and if Mr. Phelps' assertions were well founded with reference to Newfoundland he indeed would be able to administer a very serious blow to our contention. He, in effect asserts that Great Britain and Canada have asserted different rights in the Atlantic to those which they are now contending for in the Pacific. He says on page 157, that

There cannot be one international law for the Atlantic and another for the Pacific. If the seals may be treated like the fish, as only *feræ naturæ* and not property, if the maintenance of the herd in the Pribilof Islands is only a fishery, how then can the case be distinguished from that of the fisheries of Nova Scotia and Newfoundland.

Mr. President, if that argument was worth anything at all it means simply this: that Great Britian (and Canada, representing the rights of Great Britain) have either prevented or claimed to prevent the United States from enjoying the rights of fishing outside the three-mile limit or outside territorial waters in the Atlantic. Sir, I will make good what I am about to say by reference, but I assert that since the year 1783 such a contention has been impossible, and if I choose to go back I say that long before that time the contention had disappeared; but from the year 1783 down to the present time British, French, United States, and for all I know other nationals—but these are sufficient for my purpose—have been fishing side by side on the banks of Newfoundland 50 or 60 miles from shore, or whatever the distance is, without a shadow of a suggestion that the United States people were there either by grant, by sufferance, by treaty, or in any other way than as exercising the common right of all nations. Mr. President, the tribunal will not think that I am attaching undue importance to this incident, when I remind you that at pages 156 and 157, in order to enforce his argument and, if he were well justified, to pour, contempt on the position of Great Britain, Mr. Phelps has gone the length of saying:

It is enough to perceive that it never occurred to the United States Government or its eminent representatives to claim, far less to the British Government to concede, nor to any diplomatist or writer, either in 1783 or 1815 to conceive, that these fisheries, extending far beyond and outside of any limit of territorial jurisdiction over the sea that ever was asserted there or elsewhere, were the general property of mankind, or that a participation in them was a part of the liberty of the open sea.

Sir, I do not wonder that this argument, forcible, strong, and very caustic—indeed much more than an *argumentum ad hominem*—extremely powerful against my contention made an impression on the Tribunal, and accordingly I find on page 745 of the unrevised note—I am not able at present to give the revised page because it is not yet printed—Senator Morgan said this to Sir Charles Russell.

You made some reference to the Statesmanship of Mr. Sumner as being superior to the conception, as I understood you, that there could be any purchase and sale of fisheries in the open sea. That opinion has not always prevailed among the statesmen of the United States, I will say for the reason particularly that in our treaty of peace with Great Britain in 1873 we found it necessary to incorporate in the treaty the following:

It is agreed that the people of the United States shall continue to enjoy unmolested right to take fish of every kind on the Grand Bank and all other banks of Newfoundland, the Gulf of St. Lawrence, and all other places in the sea where the inhabitants of both countries propose to fish.

Of course if we had the open natural right of all mankind to fish in the sea that provision was entirely unnecessary in that treaty it was insisted on and put in.

The PRESIDENT.—I believe Senator Morgan it was an allusion to previous treaties with France.

When the real facts are put before the Tribunal it will be seen that, instead of affording as my friend Mr. Phelps thought it would afford,

an argument in favour of the United States contention it is a most conclusive argument in favour of Great Britain. Sir, what happened was this. In the year 1778 the United States had made a Treaty with France that they would not interfere with the French on the banks of Newfoundland. That was at the time when the United States was struggling for its independence. It was a treaty of friendship and amity, and where having been Treaty rights as between Great Britain and France which excluded the French, the United States rebelling against Great Britain was willing to make terms: and what were the terms?

Senator MORGAN.—You mean that Great Britain had made that Treaty—not the United States?

Sir RICHARD WEBSTER.—No, the United States while in the course of its rebellion—not with Great Britain, with France.

By Article 10 of the Treaty of 1778 the United States covenanted:

> The United States, their citizens and inhabitants, shall never disturb the subjects of the most Christian King in the enjoyment and exercise of the right of fishery on the banks of Newfoundland——

that is to say in the Treaty of friendship the United States had agreed that they would not interfere with the French. In 1775 an attempt had been made by Lord North (and, if I may be permitted to say so in passing, in my mind a most unjust attempt), to restrain and to prevent the inhabitants of New England from fishing on the banks of Newfoundland, they still being, according to the contention of Great Britain, British subjects, and being engaged in rebellion. The war came to an end, and the state of things for consideration was: What should be the claims of the United States? I can scarcely but think that there are many in this room who hear me who are well acquainted with the history of those times, but possibly it may not be out of place if I refer to Lyman's Diplomacy of the United States, a work with which many are familiar. In the course of that negotiation in 1783 (which was the Treaty, you remember, recognizing their Independence) the United States people became aware that France was endeavouring to influence Great Britain, to restrict by Treaty rights, the rights of the United States upon these banks. This will point the observation that was made the other day about the elder Adams saying that he would rather cut off his right hand than let the rights of fishing go.

The PRESIDENT.—You mean fishing on the banks in the open sea?

Sir RICHARD WEBSTER.—In the open sea.

The PRESIDENT.—Not on the Coast?

Sir RICHARD WEBSTER.—I was not dealing with the coast. I will make an observation upon that in a moment. I am dealing entirely with rights in the open sea. A letter was intercepted and deciphered coming from the then representatives of France to Great Britain, which put the United States upon the alarm, and they imagined that some attempt might be made by Great Britain actually to insist on a restriction of their natural right to fish upon these banks outside. You will find the reference to that incident in connexion with the negotiations of the Treaty at page 124 of the 1st volume of Lyman's Diplomacy of the United States, published, as no doubt the Tribunal know, in the year 1828, and a book from an historical point of view of the highest authority. I might mention only in passing, I shall show it presently, that the fact is that the United States claimed the right of fishing on the Banks as of right as one of the nations. It is a mistake to suppose that she got or claimed those rights by Treaty. The suggestion made a moment or two ago by Senator Morgan that that

was inserted because there was a doubt, is proved not to be the fact. At any rate, from the opinion of Lyman and the perusal of a chapter in his book, he states in the most distinct terms that the United States claimed it as a right, and it was to prevent subsequent interference that that clause was inserted. However, with regard to the incident that led to the first clause, I will just read this passage.

On page 124.

On the side of France, the United States had much more to fear. She was disposed to curtail their fishing rights and privileges, to maintain Spain in her pretensions respecting her boundaries, and to aid England in exacting a compensation for the loyalists.

That means for the people who had been true to the British flag.

A letter written by Mr. de Marbois, secretary of the French legation, from Philadelphia, dated March 13th, 1782, intercepted and deciphered at the time, if it did not give the first intimation of similar designs in the French Court, strengthened at least the suspicions before entertained. Mr. de Marbois advised Mr. de Vergennes to cause it to be intimated to the American Ministers his surprise that Newfoundland fisheries have been included in the additional instructions. That the United States set forth pretensions therein, *without paying regard to the king's* (French) *rights*, and without considering the impossibility they are under of making conquests and of keeping what belongs to Great Britain. It will be better to have it declared at an early period to the Americans that their pretensions to the fisheries of the great Bank are not founded and that his Majesty does not mean to support them.

Or, in other words, that the French were at that time endeavouring to get, by means of the Treaty between Great Britain and the United States, a restriction or limit put upon the United States rights. That put the United States on the *qui vive;* or, rather, if it did not actually put them on the *qui vive*, it increased the suspicions that were then prevalent as to what the attempt might be; and, accordingly, when the Treaty came to be negotiated, and was negotiated, the first part of the third Article was in these terms.

It is agreed that the people of the United States shall continue to enjoy unmolested the right.

I. To take fish of every kind on the Grand Bank and all the other banks of Newfoundland. 2. Also in the Gulf of St. Lawrence 3. And all other places in the sea where the inhabitants of both countries used at any time heretofore to fish. And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland and as British fishermen shall use (but not to dry or cure the same on that island).

Then it says:

"And also on the coast" etc.—giving them coast rights. You will remember, Sir, that quoting from the language of the counsel of the United States, on page 1113 of the unrevised edition, the Attorney General cited the expression:

That explains the reason why it was that the elder Adams said he would rather cut off his right hand than give up the fisheries at the time the treaty was formed.

You will observe the expression—"give them up".

Now we come to that which in my submission is most conclusive proof that our contention is right. You will remember that Mr. Phelps said it never had occurred to a Diplomatist,—an American Representative or anybody else,—to suggest they had this of right. I think it will be scarcely disputed, even for the purposes of this argument, that war puts an end to Treaties. I suppose I need not cite instances, (of which there are so many that I might almost call them numberless), of particular privileges existing before a war, being put an end to by the war. I need cite no other than this,—that the special privileges given by Clause 3 of Article III with regard to the coast were put an end to by

the war of 1812; and, when the United States came to negotiate for fresh privileges under the Treaty of 1818, they acted in accordance with the recognized law of nations.

Lord HANNEN.—Was it 1818?

Sir RICHARD WEBSTER.—1818 was the date. The actual Treaty of Peace was in 1815; the Treaty of the fisheries was in 1818. When the United States came to negotiate with regard to fresh liberties within the territorial waters, or in other words to get a substitute for that which they only got by the Treaty of 1783, they insisted on getting it by Treaty and they got it by Treaty; but did they either ask or get any fresh grant of the right to fish upon the Grand Banks of Newfoundland, and on all the other banks of Newfoundland? They did nothing of the kind.

The question was never raised or suggested—I will show it in writing in a moment—after 1783, that the United States had that right as a nation. Why, Sir, there was one case in the year 1818. It is referred to at page 91 also of the 2nd volume of Lyman, where a vessel having been seized about six miles off the coast, the British Government repudiated the act—would not have anything to do with it; and it is the fact that diplomatically, openly, and without the slightest reserve Great Britain after 1783, has recognized the right of the United States to fish on those banks—the right as a nation by without regard to any grant by Great Britain. There cannot be a stronger instance or argument in support of my contention in opposition to that of my learned friend Mr. Phelps than to point out that if it were true that they got the right of fishing on the Grand Bank by the Treaty of 1783, they would have had to get a renewal of that Treaty after the war of 1812, and not only did they not get it, but never even asked for it. Why not? Because it was openly stated that Great Britain recognized that right to fish as being the right of a nation to fish, quite independently of any grant or right by Treaty. In fact, Mr. President, the Treaty of 1783 is an instance by anticipation of what occurred in 1824 and 1825; in 1824 and 1825, Russia having made a claim to interfere with rights of navigation in fishing on the high seas, withdrew those claims and acknowledged they were withdrawn by the first articles of the Treaties of 1824 and 1825. Forty years before, in the year 1783, the United States, fearing that there might be some impediment or claim against their right, got inserted the words in the Treaty that the United States should continue to enjoy unmolested the right. The case is identically parallel.

But now, Sir, I have stated that Great Britain never insisted upon the position that the United States had this right of fishing upon the Banks by virtue of the Treaty of 1783 or otherwise than as a nation. I refer again to the commission which was given to the representatives of Great Britain under date the 28th July 1814 for the purpose of negotiating the Treaty of 1818. It was read by Sir Charles Russell. You will find it at page 1111 of the unrevised Report of the 28th day:

> You will observe that the 3rd Article of the Treaty consists of two distinct branches. The first which relates to the open sea fisheries we consider of permanent obligation, being a recognition of the general right which all nations have to frequent and take fish on the high seas. The latter branch is, on the contrary, considered as a mere conventional arrangement between two States, and as such it has been annulled by the war.

But as my learned friend Mr. Phelps says—and he will forgive me, I am sure if for the necessities of my argument I must once more read this extraordinary language:

> It never occurred to the United States Government or its eminent representatives to claim, far less to the British Government to concede, either in 1783 or in 1815 that these fisheries were general property.

I do not imagine that those who have prepared the Case of the United States are unacquainted with the book to which I have been making reference. I mean Lyman's Diplomacy of the United States, and it is a little remarkable in the face of what I am now going to read to the Tribunal from that book, that such a statement should have appeared.

You will remember, Mr. President, that my learned friend, Sir Charles Russell, read the letter from Lord Bathurst to Mr. Adams also from the United States official Papers, and we have the volume here. He read the letter from Bathurst to Mr. Adams in 1815 in which he (Lord Bathurst) said, as I have been saying, that Great Britain recognized the right of the United States to enjoy that fishery, as one of the nations of the world. When we called attention to that letter my learned friend, Mr. Phelps, was good enough to tell the Tribunal we need not trouble further about the reference because he had the book from which we read, in Court, or in Paris. Sir, that letter from Lord Bathurst to Mr. Adams is set out in this book—Lyman's Diplomacy of the United States; and here, at any rate was a diplomatist who knew what was the true state of the matter, and argues, as he is entitled to argue, in this book that the United States always had this fishery as of right, and that the Treaty of 1783 was simply for the purpose of preventing molestation, fearing claims might be set up, and more than that, that subsequently there was no renewal of that right. I will call your attention to two passages in Lyman's Diplomacy. It sets out the commission to the United States Commissioners to negotiate the Treaty, and the terms of the Commission are given at page 86 of the second volume. They are set out in terms.

I read not from the actual language at full length, but from the text of Mr. Lyman:

> The most important matter, adjusted at this negotiation, was the fisheries. The position assumed at Ghent, that the fishery rights and liberties were not abrogated by war, was again insisted on, and those portions of the *coast* fisheries, relinquished on this occasion, were renounced by express provision, fully implying that the whole right was not considered a new grant. The American commissioners in 1814 were instructed not to bring that subject into discussion, and the proposition ultimately submitted, securing the rights and liberties, as in the Treaty of 1783, arose from a stipulation, offered by the British commission, respecting the Mississippi, a right invested by the American with the same permanent character, as the fisheries themselves. The English, knowing the slight comparative value of the Mississippi, proposed the two parties should resume their respective rights in consideration, respectively, of a full equivalent; but this proposition was not accepted, for, in the opinion of one party, the right remained entire, and lest it should be impaired by implication, the American commission offered to recognize the right of Great Britain to the navigation, and declined the boundary of the parallel of the 49th degree to the north, (since agreed on) not choosing, even, to accept an implied renunciation on the part of Great Britain to that navigation.
>
> The instructions for the Commissioners in 1818 do not agree precisely with the position, assumed at Ghent, respecting the Mississippi.

Then lower down on the same page.

> A certain part of the doctrine, as to the effect of war on the treaty of 1783, is undoubtedly sound, but it appears to us, the remark is equally just, that certain portions of the fishing rights or liberties have, from the commencement of the first negotiation with England, been made the subject of Treaty regulation. These remarks, of course, do not apply to the bank, or deep water fisheries, about which all formal stipulations are needless.

That, Sir, was Mr. Lyman's opinion. My learned friends will scarcely deny that he was a diplomatist of eminence, and it will show you, at any rate, that this is no fresh case we are setting up. But, Sir, at page 97 occurs the passage in that letter from Lord Bathurst to Mr.

Adams, which I respectfully submit in a conclusive answer to this contention put forward by my learned friend, Mr. Phelps.

When, therefore, Great Britain, admitting the independence of the United States denies their right to the liberties—

You will remember that the liberties were the inshore rights

it is not that she selects from the treaty articles or parts of articles, and says, at her own will, this stipulation is liable to forfeiture by war, and that it is irrevocable; but the principle of her reasoning is, that such distinctions arise out of the provisions themselves, and are founded on the very nature of the grants. But the rights, acknowledged by the Treaty of 1783, are not only distinguishable from the liberties, conceded by the same Treaty, in the foundation, upon which they stand, but they are carefully distinguished in the Treaty of 1783 itself. The undersigned begs to call the attention of the American minister to the wording of the 1st and 3rd articles, to which he has often referred for the foundation of his arguments. In the first article, Great Britain acknowledges an independence, already expressly recognized by the powers of Europe and by herself in her consent to enter into the provisional articles of November 1782. In the 3rd article Great Britain acknowledges the *right* of the United States to take fish on the Banks of Newfoundland and other places, from which Great Britain has no right to exclude an independent Nation.

That is the language of Lord Bathurst on behalf of Great Britain in the year 1815. It is a little hard that for the purpose of this case, for the purpose of endeavouring to allege inconsistency on the part of the Representatives of Great Britain, that my learned friend should have, perhaps by inadvertence, thought fit to say in his Case that it never occurred to the Representatives of Great Britain to point out that the Fisheries on the Bank of Newfoundland were enjoyed as of right.

In order to point my observation, I read further from the letter:

But they are to have the *liberty* to cure and dry them in certain unsettled places within his Majesty's territory.

And the next passage refers to those liberties being such as those that were put an end to by the war.

It is surely obvious, that the word *right* is, throughout the treaty, used as applicable to what the United States were to enjoy in virtue of a recognized independence and the word *liberty* to what they were to enjoy as concessions, strictly dependent on the treaty itself.

Sir, I cannot believe that had Mr. Senator Morgan in his mind the facts that my learned friend the Attorney General and I have taken entirely from the official documents, from the language of the American Representatives, from the language of the Representatives of Great Britain at the time these matters were under negotiation, that it would have escaped his attention, that the language of the first clause of Article III of the Treaty of 1783 was inserted for the purpose of preventing molestation in respect to a right which the United States people claimed as of right by virtue of their being recognized as an independent Power,—as one of the nations of the world.

Senator MORGAN.—My difficulty, Sir Richard, in making that suggestion was this; why the American people should have apprehended molestation about a matter that Great Britain made no claim to at all.

Sir RICHARD WEBSTER.—Well, Sir, I have already, I think, answered that; but I may do it again in one summary. It was that they themselves had made a bargain with France,—there had been a claim made by Lord North to exclude them on the ground of being subjects in rebellion, and, therefore, they could be so excluded, and it is a clause inserted against any subsequent interference—in fact just in the same way, Mr. Senator, as I have submitted to you, I hope not unsuccessfully, that under the first Articles of the Treaties of 1824 and 1825 between Russia and the United States, and Russia and Great

Britain respectively, neither the United States nor Great Britain got the grant of anything; they merely got the acknowledgment that claims previously made were to be no longer insisted upon by the Nation that had put them forward.

But, Sir, as a matter of fair play, as a matter of common justice, when this is introduced by a statement is there to be one law for the Atlantic and another for the Pacific? what answer is there to the fact to which I invite the attention of my learned friend, Mr. Phelps, that from 1783 down to the present time (and that is now more than 100 years) the fishing boats of all countries have been fishing upon the Banks of Newfoundland outside the territorial waters without the slightest attempt on the part of the Government of Great Britain to interfere either with France, or with the United States, or with anyone else; and the suggestion is entirely unfounded that we are seeking here to claim from this Tribunal a right in respect to the seals of the Pacific which we have not conceded to the United States in respect to the cod of the Atlantic. Surely, Sir, if there is to be reasonable appreciation, as there must and will be, of the arguments used on the part of Great Britain, it will remain for the United States advocates not to re-assert a statement which at present is unsupported by any authority, but to give me the date, the place and the person when, where, and by whom, the assertion of the right to exclude the United States from the enjoyment of such national rights has been asserted by Great Britain. Certainly, in connection with the very caustic observation inserted at pages 155 and 157, it is for my friends to deal with the facts as I have now placed them before this Tribunal; I have based my statement, as you are aware, not on my imagination but upon documents which stand upon record and have stood upon record for the last 50 or 60 years, nay even a longer period than that.

Sir, the next branch of my learned friend Mr. Phelps' argument is that which we find on page 158. It includes a passing allusion to the law of piracy, which might, I think, have been well left out of the present consideration. But I suppose I must regard this as serious as it was inserted with consideration and is to be adhered to. Calling attention, or arguing, rather, upon the question of the right of self-defence, the sealers are practically compared to pirates,—nay more, piracy is rather held up as being a pursuit to be practised, and to be approved of in comparison with pelagic sealing.

This is no exaggeration, Mr. President. At page 158 occurs this language speaking of piracy: "The reason of this well settled rule is not found in the character of the crime which is but robbery and murder at worst." How much further do they wish to go? "*Robbery and murder at worst*"! I want to know what other crimes there are? "but in the necessity of general defence". This is the first time, Sir, in the history of argument on international law that I ever heard that the right to capture and to string up and to shoot pirates was a necessity of general defence,—if that means the defence of a nation in respect of its rights. Sir, writer after writer, Judge after Judge, has justified the law which applies in the case of pirates, on the ground that they are "*hostis humani generis*", that is to say that they rob persons and outrage all rules of property and morality, and, therefore, quite apart from the defence of a particular nation they are to be punished when caught red-handed by whom caught, or may be taken into any Tribunal of any country and there dealt with. Sir, my learned friends must have been a little bit in a difficulty to find a justification for this application of the law when they said that the reason for this well settled rule is not

found in the character of the crime which is but robbery and murder at worst, meaning thereby I presume that the shooting of seals at sea is worse than robbery and even worse than murder.

But this is not Mr. Phelps alone.

Mr. PHELPS.—It is certainly not me. I said no such thing.

Lord HANNEN.—No.

Sir RICHARD WEBSTER.—I assure you I am only too glad to take any correction but if my learned friend will permit me to call attention to page 214 there it is in black and white signed by the distinguished name of Mr. Carter. This is of the pelagic sealer alone:

To prevent and punish it is as distinctly the duty of all civilized nations as it is to prevent and punish the crime of piracy. The pelagic sealer is *hostis humani generis*, just as the pirate is, though with a less measure of enormity and horror.

Lord HANNEN.—There it is a "less measure".

Sir RICHARD WEBSTER.—Well, I will construe that in the sense that Mr. Carter desired to say there is a less measure; but the principle that Mr. Carter is advocating there is distinct. Surely I am not saying that which is unnecessary when I point out that the argument of the United States drives them into this position, that unless they can establish to your satisfaction that pelagic sealing is to be placed in the category of piracy, half—nay, more than half, practically the whole of their authorities are cut away. Sir, what is the idea of this comparison of piracy? I do not know whether the Tribunal remembers it. Of course, it has a ludicrous side for this Tribunal, but there was nothing ludicrous in the Court of Alaska when those poor captains and sailors were before the Judge and were told that they were pirates and it was said that they were to be treated as pirates.

Lord HANNEN.—They were told that they were to be treated as having violated the municipal law.

Sir RICHARD WEBSTER.—I am speaking of that which was said of them by the Judge. I am not in any way suggesting that the United States would willingly for a moment use language to these men in that respect, but all I mean is, that in order to strengthen this case, the United States people have found it necessary to endeavour to bring pelagic sealing within the category of piracy, and why? My Lord as well as the other members of the Tribunal will remember that over and over again, Lord Stowell, Mr. Justice Story and Chief Justice Marshall have said that the only case in which they knew that in time of peace the right of search of vessels existed, was in the case of piracy.

The one case in which it is admitted that a right, which may be said to be a belligerent right under ordinary circumstances, did exist in time of peace was in case of Piracy. The passage was read by the Attorney General; it was said by Lord Stowell in the case of the "*Le Louis*" reported in the 2nd Dodson, and cited in the United States Argument at page 160, and also cited in support of the existence of the right of search, at the bottom of the page.

Upon the same principle has been maintained the right of visitation and search, as against every private vessel on the high seas, by the armed ships of any other nationality. Though this vexatious and injurious claim has been much questioned, it is firmly established in time of war, at least, as against all neutrals. Says Sir William Scott, in the case of *Le Louis* (2 Dodson, page 244): This right (of search) incommodious as its exercise may occasionally be, has been fully established in the legal practice of nations, having for its foundation the necessities of self-defence.

Yes; but what, in that Judgment, does he say at pages 244 and 245? He says:

Except against pirates, no right of visitation and search exists on the high seas save on the belligerent claim.

Now, you will see why it was necessary for the argument of Mr. Phelps, and also that of Mr. Carter, to endeavour to get the Tribunal to accept the view that pelagic sealers were to be regarded and treated in the light of pirates by this Tribunal. I accept the correction of Lord Hannen, which is a correction I ought not to overlook; namely, that it is not just to say that they were ever charged in fact in the United States Court with any other offence than that of breaking the municipal Statute; but my observations were directed, not to the formal proceedings, but to the attempt that has been made to colour this act for the purpose of the case now presented to this Tribunal.

Now, the next line of argument adopted by my learned friend Mr. Phelps is based on the laws of quarantine referred to at page 159. I have said that the rules of evidence are lax enough, and all kinds of evidence have been introduced by both sides; I draw no distinction between the two parties in this respect,—hearsay, opinion, and all classes of evidence have been introduced; but, when it is suggested by my learned friend in his Argument that the Quarantine Laws have been used to interfere, or are intended to interfere with vessels upon the high seas, it is not asking too much to say, "Will you be good enough to tell the Tribunal by what nation and at what time any attempt to interfere with vessels, passing through the high seas, under the Quarantine Laws has ever been known or has ever been made?"

Mr. President, what is quarantine? Quarantine is a local municipal regulation; that, when a vessel is coming to your ports and to your harbours from an infected place, she should not be allowed to come into your ports without a clean bill of health. If she has not got a clean bill of health, she has to be put into a certain position and be disinfected for a certain time. Now, where is the quarantine performed? Everybody acquainted with these matters knows that the quarantine is performed in the country where the vessel intends to unload its cargo or disembark its passengers.

The Attorney General, put a case to the Court; and I should wish to enforce it. Take a vessel bound to France, Germany, or Belgium or Russia passing through the English Channel. Has anyone ever heard of an attempt by Great Britain to stop such a vessel and say she is to be subjected to penalties because of the quarantine laws? The mere statement of the case, I submit, is conclusive. When a ship is going or a person is going to visit a territory, it is a part of the prerogative right of the Crown, and I suppose in the United States of the President, but I will not venture on surmise in that matter, but someone has the power, to make laws or lay down rules under which foreigners shall visit the country. We, by our legislation, of course, prescribe the conditions under which foreign ships shall visit our shores, and among them are the Quarantine Acts.

We have told you and I am permitted to say it with the authority of the Public Department for which I have no longer the right to speak, but my learned friend the Attorney General has, that such an instance in Great Britain is unheard of, that no attempt has been made, or could be made; and on principle as I have said, when you remember the process called Quarantine is to be done in the country which the ship is going to visit, it is obvious it can have no application quite apart from the terms of the Municipal Act to vessels merely passing through the high seas. When these Acts were under consideration by the Court of Queen's Bench in that judgment so often relied upon by my learned friend, Mr. Carter the *Queen* v. *Keyn* the true ground of the Quarantine Acts was considered. They are put by Lord Chief Justice Cockburn at page 89:

I am further of the opinion that Parliament has a perfect right to say to foreign ships that they shall not, without complying with British law, enter into British ports, and that if they do enter they shall be subject to penalties unless they have previously complied with the requisitions ordained by the British Parliament; whether those requisitions be, as in former times, certificates of origin, or clearances of any description from a foreign port, or clean bills of health, or the taking on board a pilot at any place in or out of British jurisdiction before entering British waters. Whether the Parliament has so legislated is now the question to be considered.

Therefore, Mr. President, I ask the Tribunal in considering the argument I have addressed to you on this matter, to say there is absolutely no analogy; it falls within the principle I enunciated before the adjournment to day that these laws are intended to operate and to have effect only on vessels coming to our own country and to our own ports and upon our own vessels; those were the words used by Mr. Justice Story in the case of the "Apollon" which will be found reported in the 9th Wheaton.

Then Mr. Phelps at pages 160 to 163 asserts in his argument that Great Britain has claimed the right of search in time of peace. I am going to make but one observation with regard to that matter. We were of course surprised when we found the reference made to the letter of Lord Aberdeen. We sent for that letter and the Tribunal have now before it the original letter of Lord Aberdeen, the contemporaneous letter of Mr. Stevenson who represented the United States speaking of the year 1841, and again we have the debate and diplomatic correspondence in the years 1858 and 1859.

The result of that being that so far from it being true that Great Britain had never abandoned, if she ever claimed, but still insists upon this right of search in time of peace, the very document referred to by my learned friend in his argument contains the most complete and absolute refutation of the argument put into the mouth of Great Britain on behalf of the United States.

Sir, I believe that, without, of course, pretending to say that I have covered the ground in the same way upon this part of the case as my learned friend the Attorney-General did, I believe that I have noted all of the heads of argument on the question of protection which have been cited by Mr. Phelps in support of his view. And I come back to that principle upon which, and by which in my submission to this Tribunal, this case must be determined, so far as this matter is concerned. If the United States have got the right of property in the seals or in the seal herd, that property does not cease when those seals leave the territorial waters of Behring Sea; and I should admit that from the point of view of what may be called defence in that sense—that if the United States, or the representative of the lessees could say to the pelagic sealer a thousand miles south of the Pribilof Islands, or in the Gulf of Alaska, or away to the west of those islands of which I gave the name this morning, "That seal which you are going to shoot is mine, you must not shoot it", he would be allowed to take measures, not to break the peace, but to take measures to prevent the seal being shot, and in a municipal court, if the man who had shot the seal came into the jurisdiction, so that he could be sued, might have the right to bring what we call an action of trover or an action for the value of the seal.

Senator MORGAN.—Or if the ship was brought into the Prize Court, they could proceed against the ship?

Sir RICHARD WEBSTER.—No I have never heard of such a thing as a proceeding in a Prize Court because a piece of property was taken except in time of war. It is foreign to the whole principle of our juris-

diction. There is no relation, forgive me for a moment if I enlarge upon it—there is no relation between the offence and the punishment.

Senator MORGAN.—I do not understand, Sir Richard, that the jurisdiction of a Prize Court depends upon the fact that there is an existing state of war.

Sir RICHARD WEBSTER.—There must be either an existing state of war or an arrangement by treaty between the parties.

Senator MORGAN.—I think not.

Sir RICHARD WEBSTER.—Well Sir, I speak subject to correction. I am aware of the slave trade conventions, whereby vessels were allowed to be taken in and condemned as between two nations.

Lord HANNEN.—The prize court is usually assigned to the admiralty court; but I never heard of a prize court except in relation to war. I never heard of such a thing.

Senator MORGAN.—What becomes of the cases of the violations of the customs laws? smuggling?

Sir RICHARD WEBSTER.—With great deference to Senator Morgan, they would not be enforced in a prize court at all. They would be enforced in a municipal court to which jurisdiction was given by statute.

Senator MORGAN.—Prize jurisdiction.

Sir RICHARD WEBSTER.—I beg your pardon.

Senator MORGAN.—Jurisdiction to condemn a prize by capture and confiscation.

Sir RICHARD WEBSTER.—I beg your pardon, Sir. I say with the greatest respect that there is not a vestige of authority that a prize court would be necessary in order to put into force a breach of municipal statute.

Senator MORGAN.—I do not mean it is necessary; but it occurs to me that it is the subject of such jurisdiction; that the municipal statutes can confer that power upon the prize court.

Lord HANNEN.—Of course a court may have that power, but by the municipal law it would have powers analogous to those which are exercised by a prize court.

Senator MORGAN.—That is exactly the power conferred by Act of Congress upon the courts of the United States.

Lord HANNEN.—That may be; but a prize court is something, so far as my knowledge goes, which has only relation to a state of war.

Sir RICHARD WEBSTER.—By the law of both countries.

Senator MORGAN.—That seems a national view of it; but every State has the right to give to its courts such jurisdiction. A prize court is a municipal court, and depends for its jurisdiction upon municipal law. It derives its jurisdiction under the municipal law.

Sir RICHARD WEBSTER.—It is a confusion of terms.

Senator MORGAN.—I will hear you, with pleasure.

Sir RICHARD WEBSTER.—With great deference, it is a confusion of terms.

Senator MORGAN.—I think not.

Sir RICHARD WEBSTER.—Suppose a statute passed against smuggling,—we will take the case of a law, first, if you please—that brandy shall be subject to a duty of $5 a gallon. Any person who smuggles brandy shall be liable to a penalty of $100 and the ship, just the same as, according to our law, the ship can be seized and confiscated.

Senator MORGAN.—The ship commits the offence.

Sir RICHARD WEBSTER.—If you like. It is immaterial to my purpose. The man commits the offence, but his ship is supposed to do it.

Senator MORGAN.—The offence is attributed to the ship.

Sir RICHARD WEBSTER.—The ship comes in: is seized by a custom-house officer: is libelled—which is the expression formerly used in the old courts—is libelled and condemned. That court does not act as a prize court in doing that. I will go further;—there is no foundation for the suggestion that in exercising that jurisdiction the court would be a prize court. It may very likely be that you have said to that court "If a prize case arises you shall have prize jurisdiction." We were told by Mr. Phelps, and I will take it from him—I do not think the statute has been produced by which these Alaskan courts have prize jurisdiction, so far as the municipal laws can give it. I have not seen the statute, and, I cannot therefore express my own opinion upon it, but that would not make them prize courts when they condemn a ship for smuggling; and no lawyer would say for a moment that when the schooner "San Diego" belonging to San Francisco was condemned in the Port of Alaska for a breach of the revenue laws it was condemned in a prize court. Under this same statute, section 1954 actually applies the laws with regard to customs, commerce and navigation, and gives this court jurisdiction in respect of breaches of those laws.

Sir, but I will ask my learned friends if they are going to say that the Alaskan court, condemning an American schooner for a breach of the revenue laws—the very case you put—for running brandy on the coast of Alaska, was sitting as a prize court, I will ask them for their authority.

Senator MORGAN.—You will find it in the statutes, Sir Richard.

Sir RICHARD WEBSTER.—I should like to see the section of the statute that gives them that jurisdiction as a prize court, it is an offence against municipal law. The municipal law provides a penalty and the forfeiture of the ship.

An American ship having smuggled goods into the port of Alaska, she is libelled; she is sold; the captain is fined. There is not a vestige of an authority for the suggestion that that is the act of a prize court.

Senator MORGAN.—Except that authority which is given by the statutes of the United States, which authorize the courts to proceed as in cases of prize for the condemnation of smugglers.

Sir RICHARD WEBSTER.—I have not yet seen such a statute. It is not in the statute set out in the United States appendix.

Lord HANNEN.—Mr. Phelps, for convenience, could you refer us to that statute conferring what we will call prize jurisdiction upon the local courts of Alaska?

Mr. PHELPS.—I will have it looked up, Sir, and present it to the Court.

Sir RICHARD WEBSTER.—I am much obliged to Lord Hannen for putting that question. I had ventured to say that the statute set out in the Appendix did not contain such authority.

Senator MORGAN.—If you will allow me, I will state my proposition in regard to that.

Sir RICHARD WEBSTER.—All I desire to say is that the United States printed for our information in volume one of the Appendix to the Case, pages 92, 99, the statutes applicable to this case, applicable to the seizure of these vessels, giving the Alaskan Court jurisdiction, and permitting the proceedings to be taken.

Senator MORGAN.—I do not know that I am responsible for the attitude in which this question may have been presented to the slightest degree. The counsel certainly would not like it that I should be held responsible.

Sir RICHARD WEBSTER.—I do not know that, sir. They might do worse.

Senator MORGAN.—But I understand the law to be this in regard to prize courts. They derive their jurisdiction from the municipal law. There is, however, a sort of jurisdiction which comes to them from the very ancient usages under the international law, which, when they are called prize courts, may enlarge the purview of their authority and power; but no nation, as I understand it, can establish a prize court within the bosom of another nation.

Sir RICHARD WEBSTER.—Except by treaty.

Senator MORGAN.—I mean by its own authority.

Sir RICHARD WEBSTER.—Quite right.

Senator MORGAN.—And therefore the power of a nation to organize and to confer authority upon its prize courts must be a municipal power in its authority, in its rules; and whatever is done within it is according to what the usages, customs and decisions of that prize court, subject to the appellate authorities over it, may consider to be proper.

Sir RICHARD WEBSTER.—I believe, Sir, that the true view is that the prize court, constituted by municipal law, has to administer international law. I do not, of course, want to appear to be arguing this matter.

Senator MORGAN.—I have advanced nothing in the nature of advocacy. I have a right to ask your opinion upon any question you are discussing.

Sir RICHARD WEBSTER.—Certainly; but I beg to remind you that you were not responsible for the way in which it was framed by my friends.

Senator MORGAN.—I am not.

Sir RICHARD WEBSTER.—Let me put two or three cases which are perfectly well known to the Tribunal. They know what maritime lien is and a condemnation of a ship *in rem;* a ship comes into port. She is arrested for salvage, or she is arrested for a collision, and she is sold.

Senator MORGAN.—You mean a vessel brought into port.

Sir RICHARD WEBSTER.—No. An American ship comes into the ports of Great Britain. She is libelled in the admiralty court in the case of collision, and the damage is so great that it is more than her value. She is condemned and sold by the Marshal of the court. You would not say, Sir, that that court was sitting as a prize court.

Senator MORGAN.—I would not.

Sir RICHARD WEBSTER.—The fact that there is condemnation and sale, or condemnation of the vessel, does not make it a prize court; and if there is any thing in this point, or rather in the suggestion that you have been good enough to put to me, it would equally apply to the condemnations *in rem* in our courts.

Senator MORGAN.—If you will allow me, in the case you suggest of a collision, there is a private wrong to be redressed by the action of a court of admiralty. In the courts of prize jurisdiction there is a public wrong to be redressed through the agency of what are termed prize courts.

Sir RICHARD WEBSTER.—My next observation would have met that. The most common case for condemnation for revenue is for smuggling. An information is filed in the name of the Attorney-General on behalf of Her Majesty, the Queen. I do not know what the corresponding procedure is in the United States, but I should rather suppose that some public officer has the right of suing for the penalty, or taking proceedings for the penalty, in his own name, against the ship, or against the owner, as the case may be. That vessel is condemned and

sold for a breach of the revenue laws. I say no man who has ever considered that matter would consider that that court was acting as a prize court.

Senator MORGAN.—That depends on the nature of the statute under which the court was acting.

Sir RICHARD WEBSTER.—I am entitled to say, where is the statute which suggests it was a prize jurisdiction? I appeal to Mr. Justice Harlan. It is so foreign to anything that is in these statutes that it is impossible for an English lawyer, at any rate, to understand how such a question could have been raised. The court may have a prize jurisdiction. The court may have an admiralty jurisdiction. For all I know, it might have a small debt jurisdiction. It may have a divorce jurisdiction. It may have a chancery jurisdiction, or any number of jurisdictions. But because it has got the jurisdiction, it does not make it act as a divorce court when it is trying maritime cases, or as a probate court when it is trying divorce cases. And so in the same way, the fact that a ship is condemned under this statute does not make that court a prize court; and to those who advocate this theory, I would place my learned friends Mr. Carter and Mr. Phelps, in this dilemma—

Mr. PHELPS.—What theory do you understand us to argue?

Sir RICHARD WEBSTER.—I was only assuming for the moment that you would argue the theory submitted by the learned Senator. That is all, Mr. Phelps. I will say nothing more than that; and you will not think it wrong, I am sure, to put it in this way.

Mr. PHELPS.—Not at all.

The PRESIDENT.—I hope you will not understand the opinion of an Arbitrator, whoever he may be, and whatever may be his nationality, to be on the side of any of the parties here.

Sir RICHARD WEBSTER.—I think you misunderstood me, Mr. President. I am doing nothing, with great deference, either irregular or improper.

The PRESIDENT.—I do not mean to say you are doing anything improper.

Sir RICHARD WEBSTER.—I am assuming that Mr. Phelps contends that the court of Alaska is to be presumed to act as a prize court in condemning these vessels. I am assuming that my first question would be, if an American ship is condemned because engaged in shooting seals in the waters of Behring Sea, by the Court of Alaska, will my learned friend contend before this Court, and assume the responsibility for the advocacy of this position, that that Court was acting as a prize Court?

Mr. PHELPS.—It may possibly help my learned friend if I say in a word that I conceive that no question whatever in regard to the validity of those seizures, and no question whatever in respect of the right of the United States to seize any vessel hereafter, is submitted under this Treaty to the Tribunal, so far as I am concerned.

Sir RICHARD WEBSTER.—Of course, in one sense, it relieves me, but it is in no sense any assistance to the particular point that was under discussion. To say that my learned friend does not agree that any such matter is submitted to the Tribunal, is one thing. That is not the point. The point is whether the view which was submitted for my consideration by a member of the Court, that the Alaskan tribunal is to be assumed to be acting as a prize court, is correct.

The PRESIDENT.—I believe one of our colleagues put an inquiry to you in order to elucidate the matter, for the advantage and profit of the

Arbitrators, of whatever nationality they be, and not at all to interfere with the pleading of the case, and not to take the point of view of one of the parties.

Sir RICHARD WEBSTER.—I was not suggesting the contrary for a moment. I was merely saying that if it was part of my learned friends' argument to contend that the Alaskan Court sat as a prize Court, I should immediately ask to be told the statute of the United States which makes the killing of a seal in the high seas of Alaska an offence cognizable in a prize court, and to be adjudicated upon by a prize court!

The PRESIDENT.—You are relieved of that by the answer of Mr. Phelps.

Sir RICHARD WEBSTER.—I should doubt it, Mr. President.

The PRESIDENT.—But perhaps you wish to put your own case and advocate your own views.

Sir RICHARD WEBSTER.—I have not made my meaning clear to you, Mr. President. Many days ago, when the question arose about these courts having a prize jurisdiction, Mr. Phelps was good enough to interpose and say that the Alaskan courts had got prize jurisdiction by statute, and it was with reference to that that Lord Hannen put the question to him but a few moments ago, could he, without inconvenience, tell us where this statute giving prize jurisdiction was to be found. But I am entitled, Mr. President, to press upon the Court that the only condemnation possible is the condemnation under municipal law, and that if it be condemnation under municipal law, that that will not be cognizable by a prize court, and that if it be an offence under municipal law, then it cannot, for the reasons which I have already given to you this afternoon be extended to the high seas; and further, that on the broadest view of a municipal statute, it can only be put in force against a vessel which either has recently broken the law within the territorial limits, or is intending to go and break the law within territorial limits. Not one of those arguments would apply to the case if we were dealing with a prize court.

Senator MORGAN.—I understood you to say, Sir Richard, that a prize court could have no jurisdiction except in a case of belligerency.

Sir RICHARD WEBSTER.—As a prize court.

Senator MORGAN.—I am speaking now of the power of a Government to confer upon its courts prize jurisdiction in any other cases than in case of war.

Sir RICHARD WEBSTER.—One must be accurate in one's terms. If you mean confer upon its prize courts jurisdiction to act sometimes as prize courts, sometimes to administer the revenue laws, and sometimes to administer the laws of admiralty and divorce, of course the Government have got the power to do it.

Senator MORGAN.—Except as to the question of divorce, that is exactly a description of the jurisdiction of the United States District Court.

Sir RICHARD WEBSTER.—But, Mr. Senator, that does not make the court act as a prize court when it is adjudicating between plaintiff and defendant in a small debt.

Senator MORGAN.—If the statute says so, that does make it act in that way.

Sir RICHARD WEBSTER.—That, of course, is an assertion. I must not meet it by counter assertion. I should have thought it extremely doubtful that in that case as against another nation it could make it a prize court. I should be very glad indeed, now that this case has assumed sufficient importance to be put to me by a member of the Tri-

bunal, if my learned friends would supply me with the statutes which support the view that the court is to sit as a prize court when it is condemning a person for having shot a seal under section 1956, or under section 1954.

If you would kindly look at page 95 of the statutes which have been set out, "the laws of the United States relating to customs, commerce and navigation are extended to and over all the mainland, islands and territory"; and I will assume that among the laws or customs is a prohibition against smuggling, and I will assume that the American ship has been caught smuggling and is condemned, just like a vessel in Great Britain caught smuggling is condemned by the Exchequer Division, it used to be in old days, on the Revenue side of the Court of Exchequer, but now by proceedings upon what is called the Crown side of the High Court of Justice.

Lord HANNEN.—We will assume for a moment that there is such a thing—we shall have proof of it if it exists—a court established and called a prize court, and that it should be said that it should have all the powers of the prize court; and amongst the rest that it should have the power of seizing any vessel which was engaged in the slave trade. Still, it would not be a prize court, in that sense. It would have effect against the subjects of that nation, but not against other nations.

Sir RICHARD WEBSTER.—That is my respectful contention, my Lord, in answer to the learned Senator; but of course, in my point of view, if one can put a case *a fortiori*, the case is so much stronger because the statutes of the United States which are set out, as we have seen, do not purport anything of the kind. The statutes simply purport to give an ordinary municipal court municipal jurisdiction.

Perhaps I might conclude, Mr. President, by giving an instance. Supposing that the law of United States provides that every coasting vessel shall have a certain number of cubic feet of space for the crew to sleep in, or a certain amount of lime juice put on board, or a certain amount of medicine for the crew, with a penalty for not doing it, confiscation, if you like. It would be a strong thing to say that because the court had jurisdiction in prize cases, when it was condemning that ship for a breach of the laws of navigation, it sat as a prize court. The learned Senator will, I am sure, understand that I only desire to grasp his meaning; and desiring to grasp his meaning, I cannot see the slightest ground for coming to the conclusion that there is any justification for saying that when any vessel is taken into a court and condemned by that statute, the court that condemned it was sitting as a prize court.

Sir, I have all but concluded. If you will permit me a short time to-morrow morning, I will try to sum up and deal with the point I said I should deal with, in reference to the jurisdiction of this Tribunal.

The Tribunal thereupon adjourned until Wednesday, June 7, 1893, at 11.30 o'clock A. M.

THIRTY-FOURTH DAY, JUNE 7TH, 1893.

Sir RICHARD WEBSTER.—Mr. President, I shall compress into a very small compass the remaining observations that I desire to address to the Tribunal. There is one matter to which I should not have made further reference, except for an observation of my learned friend Mr. Phelps. If you will kindly look at page 1402 of yesterday's Report, the statement made by Mr. Phelps in the middle of the discussion which I will call the "Prize Court" discussion, which was perhaps not very close to my present purpose, is this:

I conceive that no question whatever in regard to the validity of those seizures, no question whatever in respect to the right of the United States to seize any vessel hereafter is submitted under this Treaty to the Tribunal, so far as I am concerned.

Well, it surprised us all very much at the time, and it led me to look back and search my memory and again to examine my notes with reference to the United States contention; and it does occur to me to say to you, Sir, and to ask your consideration of the question why are we here if that was the real position taken up by the United States? The only way in which they have attempted to exercise jurisdiction in the Behring Sea has been by seizing the sealers' ships and by imprisoning these sealers themselves under the municipal law. But do not let it be put in any words of mine; let it be taken from the Case submitted to this Tribunal after most careful consideration by the United States,—both in the Case and Counter Case; and I shall ask the Tribunal to be good enough to refer to the pages as I read them. At page 301 the United States Case occurs this passage, after dealing with property.

[I should mention they have enumerated on pages 295 to 299 their specific findings, or what they suggest should be the findings with regard to the various questions. I need not go over those, because they are the same points to which I have been referring.]

The United States Government defers argument in support of the propositions above announced until a later stage of these proceedings.

In respect to the jurisdiction conferred by the Treaty, it conceives it to be within the province of this high Tribunal to sanction by its decision any course of executive conduct in respect to the subject in dispute, which either nation, in the judgment of this Tribunal, he deemed justified in adopting, under the circumstances of the case.

And at the bottom of the page:

In conclusion, the United States invoke the judgment of this High Tribunal to the effect.

First, as to the exercise of right by Russia. Second, that Great Britain had not objected. Third, that the body of water now known as Behring Sea was not included in the phrase "Pacific Ocean." Fourth, that all the rights of Russia passed to the United States.

Then I read the actual words.

That the United States have such a property and interest in the Alaskan seal herd as to justify the employment by that nation, upon the high seas, of such means as are reasonably necessary to prevent the destruction of such herd, and to secure the possession and benefit of the same to the United States; and that all the acts and proceedings of the United States done and had for the purpose of protecting such property and interest were justifiable and stand justified.

And upon that the United States invoke the Judgment, as they themselves say, of this High Tribunal.

Now I turn to the Counter Case to see whether that position is in any way abandoned and I will ask the Tribunal to be good enough to look at pages 130 and 135 of the Counter Case.

Reasons why seizures made.

The United States charge that each and all of the vessels when so seized were engaged in the hunting of fur seals in the waters of Behring Sea in violation of the Statutes of the United States and that such seizures were made in accordance with the laws of the United States, enacted for the protection of their property interest in the fur-seals which frequent Behring Sea and breed only upon the Pribiloff Islands which Islands are part of the territory of the United States.

In page 135 just above the signature occur these words.

The Government of United States, in closing its presentation of the matters in controversy by his reply to the printed Case of Great Britain re-asserts the positions taken in its printed Case and all of the propositions and conclusions contained therein, and is prepared to maintain the same by argument before the Tribunal of Arbitration.

And that which I read from page 301 and page 303 of the United States Case are among those very conclusions to which attention is there directed. One scarcely needs to refer to the words of the Treaty for this purpose but when you remember the opening words of the preamble so often referred to by the members of the Arbitration.

The questions which have arisen between the Government of Her Britannic Majesty and the Government of the United States in the waters of Behring's Sea and concerning—

and so on; and, at the beginning of article I the same words occur, and we are to be told to-day that no question arises as to justification, legality, or validity of those acts. I do not understand what is the meaning of the pages and pages of the written argument of my learned friend Mr. Phelps justifying these very acts which he now says he is not concerned to defend either in the past or in the future on the ground that they are what he has called "defensive regulations".

We shall understand more distinctly what Mr. Phelps' meaning is when he argues, but I could not allow that observation to pass without a respectful protest before this Tribunal having regard to the position in which Great Britain is placed, and to the circumstances out of which this Arbitration arose.

I stated the other day that I should say a word or two upon a point suggested by a member of this Tribunal, that this Tribunal was not bound to act upon the principles of either municipal or international law.

The PRESIDENT.—Is that all that you have to say with reference to what Mr. Phelps said yesterday?

Sir RICHARD WEBSTER.—It is.

The PRESIDENT.—Then, Mr. Phelps, you will no doubt be kind enough to note what has been said.

Sir RICHARD WEBSTER.—When Mr. Phelps comes to reply, Sir, I have no doubt he will deal with it.

Now as I said I stated two or three days ago I would not fail to notice a point suggested by one member of the Tribunal that though analogy from municipal law might be of use, I only put my own paraphrase of his meaning—although the analogy of existing, recognized, international law might be of use, this Tribunal was in a sort of position to award the right of property or the right of protection independently of there being by international law, any such right recognized, existing or known. All I can say is this, again respectfully to protest

against such a question being imported into the jurisdiction of this Tribunal, or against it being suggested that when the words: "The questions which have arisen respecting the rights of property, respecting the rights of jurisdiction, of the United States"—when those questions were framed it was contemplated that this Tribunal should decide otherwise than as jurists addressed by lawyers, and applying principles of law. You will remember that the Treaty provides that the Arbitrators selected by the foreign nations shall be jurists of distinguished reputation, in their respective countries.

Mr. PHELPS.—We claim nothing different from that.

Sir RICHARD WEBSTER.—I am extremely obliged to my learned friend, Mr. Phelps, and I thank him for his perfectly courteous observation. I was going to have pointed out that I did not understand my learned friend Mr. Carter's argument in any way to deviate from that position.

Mr. PHELPS.—No.

Sir RICHARD WEBSTER.—I merely mention this because I stated in reference to an observation made that I should deal with it, but there is some little justification in the Tribunal thinking that such a thing was going to be contended from the language of Mr. Coudert, which I only notice in passing to show what I had in my mind. One of the two passages to which I refer is at page 552 of the revised print, and is in these words.

> Well in arguing before this High Tribunal the word "right" is most extensive. If there were any Tribunal of lesser dignity that could determine this question we would not have called upon you. The mere calling upon you enlarges the domain of right.

And on page 575 the same idea is repeated by Mr. Coudert in these words.

> Because it is law that we want. Law in its best sense, in its highest sense, in its most moral sense; the law that would be expected not from a statutory Tribunal, not the law that would be expected from one nation or the other, confined within narrow limitations which sometimes strangle the right; but from a Tribunal formed for the very purpose of expanding, enlarging and recognizing the beauty and greatness of international law.

Sir, I do not believe that there is any difference between Mr. Carter, Mr. Phelps and myself upon this matter, but, on the other hand, I did not feel it respectful to the Tribunal to abstain from making the observation in answer to a suggestion falling from one of your body. May I remind you, Mr. President, that the original and only cause of this Arbitration was the interference with the pelagic sealers in catching the seals, in shooting the seals in the non-territorial waters of Behring Sea, and the seizure of the British ships and their condemnation by the American Court, and I point once more to the language of this Treaty, both the opening words of article I, and articles VI and VII, making the most marked distinction between Regulations which are only to be considered in the event of the concurrence of Great Britain being necessary, and rights which the United States possess independently of Great Britain at all. That distinction would have been wholly unnecessary and wholly out of place if it was supposed that the only function and jurisdiction of this Tribunal was to deal with joint rights, or joint privileges and joint interests. Those joint rights, joint privileges and joint interests have to be considered under article VII, and have no place whatever under article VI.

Sir, there is but one other independent branch of this case to which I desire for a few moments to direct attention; and that is with reference to that which is the real principle for which Great Britain is con-

tending. In many passages of my learned friend Mr. Carter's speech, he indicated that we were morally wrong in contending for the right of our nationals to shoot seals upon the high seas, and in many of the passages of the written Argument my learned friends have declined to recognize the right of catching, fishing, shooting,—I care not what word be given to it; probably capturing seals is the best word to give,—upon the high seas as being a right at all. Our position is this, Sir; that, apart from Treaty, apart from agreement between nations, the subjects of all cannot be restrained and restricted in the exercise of their natural rights, the right of catching wild animals upon the high seas, be they whales, be they seals, be they sea-otters, be they porpoise, turtles, walrus or fish; for that is one of the natural rights that all nations equally enjoy.

My learned friend the Attorney General cited a few of the leading authorities on this point. Probably it will be sufficient for my purpose if I enumerate them to you. Chancellor Kent, Heffter, Martens, Wheaton, Manning. If my learned friends desire the actual references, or if the Tribunal desire the references, I will give them. It will be perhaps of some little assistance if I do so. In Heffter, the passage which I should desire to direct the attention of the Tribunal to is at page 149.

Mr. Justice HARLAN.—What edition?

Sir RICHARD WEBSTER.—The third edition revised and enlarged by the author. Martens, "Traité de Droit international", page 197. There appears to be only one edition, published in Paris in the year 1883. Manning I should cite from the edition of 1875, the one edited by a gentleman no longer living—a most distinguished lawyer—Mr. Sheldon Amos; I cite from page 119 of that edition. Chancellor Kent I cite from the edition of 1878 edited by Mr. Abdy at page 97—Kent's Commentaries on International Law. Chancellor Kent's own words, (not Mr. Abdy's) are these:

> The open sea is not capable of being possessed as private property. The free use of the ocean for navigation and fishing is common to all mankind and the public. Jurists generally and explicitly deny that the main ocean can ever be appropriated. The subjects of all nations meet there in time of peace on terms of equality and independence.

Those are Chancellor Kent's own words. It must not be thought that I am not reading the other passages because they are not equally pertinent, but it is out of regard to the Tribunal looking to the time I have occupied. I merely read that passage, because I understood the Tribunal desired to know from what particular book of Chancellor Kent's I was reading and whether it was his language.

Mr. Justice HARLAN.—I never saw that book before. I suppose what is in that book is in the first volume.

Sir RICHARD WEBSTER.—This is Kent's Commentaries on International Law, which I believe forms one of the volumes of his Commentaries.

Mr. PHELPS.—It forms part of the first volume.

Sir RICHARD WEBSTER.—That is my recollection exactly. It forms the opening 300 or 400 pages of one of the first volumes of Chancellor Kent's book. Then Sir Travers Twiss' work on "The Law of Nations in Time of Peace". I read from the edition of 1884 by Sir Travers Twiss at page 285. Sir, these authorities might have been multiplied to a much larger extent. I do not know among the authorities cited by my learned friend any which in any way conflict with my contention. In fact, my friends put their case on narrower grounds and on different principles; but there is one to which I wish to call attention

because we have been twitted both in the written Counter Case of the United States and orally in argument with having misunderstood those points, and that is the enunciation of the law made on behalf of the United States in the year 1832, when the question of the "Harriet" arose in the Falkland Islands. It is referred to and set out at length in the British Case, and in order to quote nothing as to which there is any dispute, I refer entirely to the documents set out at pages 185 to 191 of the United States Counter Case. Possibly, the Tribunal will be kind enough to take that volume before them. I have also examined the original documents and find nothing conflicting with the position I am now about to submit.

The criticism that is made by the United States when we used the language of the United States in regard to their rights is: At that time there was no question of deep sea fishing involved, and therefore it is not pertinent to the question in respect of which you, the British Government, cite the authority. Well, if it were true in fact it would not be any answer to the argument inasmuch as the United States have enunciated the law in most general terms, but it is not the fact. Buenos Ayres was threatening to interfere not only with the seal fishery but the whale fishery, and it is pointed out in these papers that whales were caught outside the 3 mile limit, and it is in connection with a claim by Buenos Ayres to stop and interfere with vessels doing two things, whaling and sealing; and the seals undoubtedly were caught on the uninhabited shores of certain islands as to which there was a dispute with regard to territory.

I will show from these original documents it is not an answer to the British argument, founded on the enunciation of the law by the United States themselves, to say that the only question there raised was as to killing seals on land, and that no question had arisen as to killing them on the high seas. Will you Mr. President look at page 186.

The undersigned would also call the attention of His Excellency, the Minister of Foreign Affairs, to certain declarations of Don Luis Vernet, important as coming from a high functionary of this Government, the military and civic governor of an extensive region, and if these declarations are to be considered as indicative of the sentiments and views of this Government there would be just cause for apprehending that a project was in contemplation involving the destruction of one of the most important and valuable national interests of the United States, *the whale fishery*.

You will observe that that is italicised.

For he declared to Captain Davison that it was his determination to capture all American vessels, including *whaling ships* as well as those engaged in catching seals, upon the arrival of an armed schooner, for which he had contracted, which was to carry six guns and a complement of fifty men.

The italics are not ours. I should gather from the way in which it is printed those italicised words occur in the original; at any rate I only read from the United States document.

Then on page 187:

But had the Governor, in the exercise of his authority, confined himself merely to the capture of American vessels, and to the institution of processes before the regular tribunals which administer the laws in this country with the sole view of ascertaining whether transgressions against the laws and sovereignty of this Republic had or had not been committed, and had he so done in strict pursuance of his delegated authority, yet in view of the Government of the United States even an exercise of authority thus limited, would have been an essential violation of their maritime rights; and the undersigned is instructed and authorized to say that they utterly deny the existence of any right in this Republic to interrupt, molest, detain, or capture any vessels belonging to citizens of the United States of America or any persons being citizens of those States, engaged in taking seals, or whales, or any species of fish or marine animals in any of the waters, or on any of the shores or lands, of any or either of the Falkland islands, Terra del Fuego, Cape Horn, or any of the adjacent islands in the Atlantic Ocean.

Now after some further negociations which I have looked through and which are not material for my purpose a further document was sent from the American Chargé d'Affaires to the Buenos-Ayres Minister on the 10th July 1832 and on page 188 there is this discussion about sovereignty.

We were told at one stage of this Argument the whole question in dispute was as to whether the Argentine Republic had the right of sovereignty. At the bottom of page 180 that question is put on one side showing it was not at the root of discussion.

The following is the passage.

But again if the rights of Spain to these Islands were undoubted, and if, again, it be admitted hypothetically that the ancient vice-royalty of the Rio de la Plata, by virtue of the Revolution of the 25th of May, 1810, has succeeded in full sovereignty to those rights would that admission sustain the claim which the province of Buenos-Ayres, or in other words, the Argentine Republic, sets up to sovereignty and jurisdiction.

Then again in page 189.

But again if it be admitted hypothetically that the Argentine Republic did succeed to the entire rights of Spain over these regions and that when she succeeded Spain was possessed of sovereign rights, the question is certainly worth examination whether the right to exclude American vessels and American citizens from the fisheries there is incident to such a succession of sovereignty. The ocean fishery is a natural right, which all nations may enjoy in common.

This would not be necessary if they were discussing the quesition simply of going on the land.

The ocean fishery is a natural right, which all Nations may enjoy in common.

Every interference with it by a foreign Power is a natural wrong. When it is carried on within the marine league of the coast which has been designated as the extent of natural jurisdiction reason seems to dictate a restriction, if under pretext of carrying on the fishery, an evasion of the revenue laws of the country may reasonably be apprehended, or any other serious injury to the sovereign of the coast, he has a right to prohibit it; but as such prohibition derogates from a natural right, the evil to be apprehended ought to be a real, not an imaginary one. No such evil can be apprehended on a desert and uninhabited coast; therefore such coasts form no exception to the common right of fishing in the seas adjoining them. All the reasoning on this subject applies to the large bays of the ocean, the entrance to which cannot be defended; and this is the doctrine of Vattel, chapter 23 section 291 who expressly cites the Straits of Magellan as an instance for the application of the rule.

I point out in passing Mr. President that you will observe from the point of view of the enunciation of the law if it be right—from the point of view of authority the question of going into the territorial waters becomes immaterial because, as was pointed out, they were only justifying going within the marine league, that is to say going within the distance of territorial waters for certain purposes: their real justification was fishing in the high seas. Now if you will turn over to page 190 I shall be able to conclude what I have to say in this matter.

The treaty concluded between Great Britain and Spain, in 1790 already alluded to, is to be viewed, in reference to this subject; because both nations by restricting themselves from forming settlements evidently intended that the fishery should be left open both in the waters and on the shores of these islands, and perfectly free so that no individual claim for damage, for the use of the shores, should ever arise. That case, however, could scarcely occur, for whales are invariably taken at sea, and generally without the marine league, and seals on rocks and sandy beaches incapable of cultivation. The stipulation in the treaty of 1790 is clearly founded on the right to use the unsettled shores for the purpose of fishery, and to secure its continuance.

I need scarcely point out to this Tribunal, because the perusal of the papers is sufficient, that the whole of this argument as to the whales would have been out of place and altogether unnecessary if it was true as suggested the only question was the right of going on shore.

Now look at the conclusions:

The following conclusions, from the premises laid down are inevitable:

1 That the right of the United States to the ocean fishery and in the bays, arms of the sea, gulfs and other inlets incapable of being fortified, is perfect and entire.

2 That the right of the ocean within a marine league of the shore, where the approach cannot be injurious to the sovereign of the country—as it cannot be on uninhabited regions, or such as are occupied altogether by savages—is equally perfect.

3 That the shores of such regions can be used as freely as the waters: a right arising from the same principle.

That a constant and uninterrupted use of the shores for the purposes of a fishery, would give the right, perfect and entire, although settlements on such shores should be subsequently formed or established.

Mr. President, you expressed an opinion, which I have no right to criticise, some days ago that it must not be taken as recognized international law that this right of landing on unoccupied coasts certainly is recognised at the present day. I need scarcely remind you that I respectfully agreed, as far as an advocate was entitled to agree with that expression of opinion; but I pointed out that at the time of which we were speaking it was a common thing for Nations to contend that there was such a right.

The PRESIDENT.—It was a question of sovereignty.

Sir RICHARD WEBSTER.—But, from the point of view of argument in this case, if General Foster's contention were correct, it would only strengthen my position; because the claim made by the United States, to catch whales, and to visit inhabited coasts, was put simply and solely as a branch of the right of fishing on the high seas.

General FOSTER.—It was that the vessel was seized for taking seals on land.

Sir RICHARD WEBSTER.—With great deference (General Foster will pardon me for saying it) there is no necessity for that interruption, because I refer to what the United States said with regard to the threats of Buenos-Ayres to stop the vessels whaling and as to the question that had arisen independently of a particular ship. You cannot exclude or cut away from the utterances of a Nation in this way. It suits the United States to endeavour to belittle the statements made by their Representatives in 1832, and it has suited them in many other points in this case to endeavour to do away with the effect of utterances previously made by United States Statesmen of great eminence; but my submission in reply to the interlocutory observation of General Foster is, that when you read these documents, whatever claim was asserted was asserted as flowing from the right of all nations to fish upon the high seas; and the only effect of adopting General Foster's criticism would be that that right would be cut down in so far as it did not give Nations the right of touching or of landing upon uninhabited coasts.

Sir, I submit to this Tribunal that so far from the strength of that quotation, which is of equal point whether the Statesman was of the United States, or Russian, or French, or of any other Power,—the strength of that citation is in no way removed by the documents to which I have called attention. On the contrary, they support to the letter and in full the arguments we founded upon them when our Case was framed.

But, Sir, quite apart from authority, quite apart from the utterances of any Statesman in the past, will you consider for a moment what the end of this, and the result of this United States claim, must be?

Feeling pressed by the distinction or by the argument which would be used in connection with such fish as salmon, in connection with such

fish as the knowledge of the world at the present day knows to return to their local habitation for the purpose of breeding, of which the annual increase can be taken and of which the same selection can be made as is purported to be made with seals with this additional incident, that they are actually bred artificially to increase the stock, my learned friend, Mr. Carter, endeavoured to get rid of that difficulty (a difficulty which, we submit, is bound up with and is one of the vices of his argument) by saying the distinction in the case of fish is that they are inexhaustible. Is that the present condition of knowledge either of the United States, or of Great Britain, or of any other Nation? This Tribunal is asked to recognize as a matter of international law a property in wild animals—to recognize a right of protection,—that the animals are to be considered to belong to the United States all over the sea? The argument is weak indeed if my learned friend thinks he can distinguish the case of fish on the ground of the inexhaustibility being a sufficient answer. What has been happening? May I remind you, and I have no doubt you have some knowledge of it (certainly some members of the Tribunal have) the United States, France, Canada, and Great Britain in various parts of the world have had to consider the exhaustion of fisheries and fishing banks, and they are re-stocking them by artificial means, and further it has come out in that examination that practically all of these fish, certainly the principal fish, can be identified as coming from a particular place and are of such a character even that the fish can be identified as having been bred at a particular place and are returning to it.

It would be very interesting to go into this, Mr. President, if it were closer to this case; but I do not know if this Tribunal knows that Mr. Neilsen one of the most experienced inspectors of fisheries in Norway was sent to the other side of the Atlantic to advise the Newfoundland Fisheries in this matter, and Professor Baird—I do not know whether he still lives—probably the most eminent naturalist as to fisheries in the United States had advocated the re-stocking of the deep sea fisheries and had advised that other nations should commence re-stocking and artificially hatching in order to replenish the races of fish then becoming exhausted, and that all these gentlemen from their researches in these matters, Professor Baird among the number, Mr. Neilsen among the number, have found that each of the various species of cod have their own local *habitat* and can be readily and easily distinguished. St. George's fish are known from any other kind of cod caught on the Banks. Cape St. Mary's cod are distinguished from any other kind of cod in Newfoundland; and a Trinity Bay fish is known from a Placentia fish. It would interest this Tribunal upon the question of the principle of law attempted to be pressed upon it; if there is any reason or logic in it, I could show that it would have such a far-reaching effect that the principle applied to this particular case would lead nations to claim that each individual animal or fish that could be identified, or that could be shown to have bred and shown to return to its own breeding home, was to be the property of the particular nation that could prove it came there to breed, and they had there the power of destroying the whole of them at once or allowing a certain number to go free. Perhaps also, Sir, you know, and it may be interesting to the Tribunal I should mention that this has been the subject of a very learned discussion in France with reference to the stocking of exhausted fisheries on the French coasts. Therefore, my learned friends will forgive me for saying that I think it is impossible to draw the distinction they have attempted to draw between seals and fish on the ground, as they suggest, that in one case the animals

are bred in such numbers that they are inexhaustible, because the experience all the world over is that fisheries have become repeatedly depleted; and that further, if identification and habits of returning to the same locality, is to be a sufficient test, and if the power of destroying the whole, or abstaining from destruction is a sufficient claim, this claim must be recognized in respect of various migratory birds and various other animals which are of great use to mankind, probably of much greater use than the seals, the bodies of which are wasted, the oil of which is never reclaimed, and the skin only is used for the ornamentation of the dresses of certain persons who can afford to pay large sums for their apparel.

Mr. President, I have said all that at the present stage I feel it necessary that I should say to this Tribunal. I have endeavoured only to supplement the much wider, abler, and more exhaustive argument of my learned friend, the Attorney General, and it is no part of my duty, Sir, to attempt to apply the arts of oratory or the influence of eloquence to the consideration of the questions submitted to this Tribunal. I have had two objects in view, and two only, that, so far as facts are involved, the true facts, all the facts, and the facts only shall be laid before this Tribunal, that so far as enunciated principles of law are involved those principles of law should be drawn from the best sources that are at our command, and without any attempt either to strain those principles in favour of, or to minimise their effect against, the contentions we are supporting. I am perhaps, more conscious than any one present of the deficiencies in my own argument, but I trust, with its defects, it may still have been of some service to this Tribunal; but, Mr. President, what will remain forever in my mind is the recollection of the unvarying courtesy and patience with which my observations have been received by every member of this Court.

The PRESIDENT.—Sir Richard, we thank you for the very substantial and useful observations with which you have supplemented the argument of Sir Charles Russell. We knew how much we were indebted to you already for the elaborate study you have made of this case on behalf of Great Britain, and I for one have very much admired the unrestricted and friendly co-operation of yesterday's Attorney General with to-day's Attorney General. The country is indeed to be envied where party spirit admits of such brotherly association when the national interest is at stake.

FUR-SEAL ARBITRATION.

ORAL ARGUMENT

OF

MR. CHRISTOPHER ROBINSON, Q. C.,

ON BEHALF OF GREAT BRITAIN.

Mr. ROBINSON.—I feel very strongly indeed, Mr. President, the position in which I am placed in being called upon to address the Tribunal at this stage of the discussion; but I shall be spared the necessity of further personal allusion if I may ask the Tribunal to be allowed to apply to myself, but with very much added force, the few well chosen observations with which my friend who precedes me has prefaced his argument. To me, I am afraid for a number of years longer than for him, the work of a junior Counsel has also been unaccustomed; but there are two considerations which may reconcile one, at all events to a certain extent, to recurring, for a time, to the labour of earlier years. Many gentlemen of our profession I believe would say that the place even of a junior in a great national controversy of this description, is to be preferred to the work of a senior in the ordinary duties of daily practice; and in the next place, if I may be allowed to make an observation purely personal, may I say that all the surroundings and circumstances of this case in its conduct here, and, much more, all the personal associations connected with it on every side, have been such, whatever the duties may be, important or unimportant, accustomed or unaccustomed, as to make it only a pleasure to discharge them as best one might be able.

If it has been difficult for my learned friend to follow the Attorney General (as I can well understand that it was), I trust it will be remembered how much greater the difficulty must be for me to follow not only the Attorney General, but my learned friend Sir Richard Webster as well. If I may use a simile, Mr. President, not altogether appropriate to our serious work here, it does seem to me that I am called upon to perform a task, which, while it can no doubt be best performed in the place where we are, can seldom be successfully performed by one of my own nationals. I am called upon, I fear, to present to the Tribunal something not altogether distasteful, something which may possibly not be altogether useless, but which must be made up of scraps and of leavings—the scraps and the leavings of very much better artists, and artists I may say, who have found the material so attractive, that even what they have left is not very good of its kind; by which I mean that if there are any points in this case which have not been thoroughly discussed, you will find that they are naturally the points which it is least useful to discuss. At all events I have felt very strongly, that if I could consult only the interest of the case and of valuable time, and follow the dictates only of my own judgment, I should say at once the only thing which I am able to say without doubt or hesitation—that every thing that can be said in the case on our side has been already said, and well said, and that it can serve no useful purpose to attempt to add to it.

But there is one thing, Mr. President, of which I am quite certain: It could not be of any possible assistance to the Tribunal, and therefore it would not be becoming in me, if I were to attempt to follow my learned leaders into any branch of this case in anything approaching to detail. The case has been exhaustively and thoroughly discussed, as it was abso-

lutely necessary that it should be discussed, and for very obvious reasons. I do not think it is too much to say that Arbitrations as a means for the settlement of International disputes may be said to be yet upon their trial. There are very many who believe—all right minded men most earnestly hope—that to an increasing extent they may become the substitute for the only means, so terrible in its consequences, which can be made available in their place; but if they are to do this they must justify themselves by their works. There are many people I believe now watching this Arbitration most anxiously, who know very little of the merits of the case, and who care absolutely nothing for the success or failure of either of the contending parties; but they watch it in the hope that it will show to the World, and the two nations that are engaged in it, that if Nations do not obtain certainly by these means all that they might possibly have obtained by the test of war—by the test of *might*—they are at least certain to secure all that they can shew themselves entitled to by the far preferable and more reasonable test of *right*. It was necessary therefore, and essential, that every principle involved in this case, every consideration which either side might think it worth while to bring to the attention of the Tribunal, should be carefully and anxiously examined—every principle which is thought applicable tested, and traced to its source—and every argument great or small which could have any bearing on the case should be most anxiously weighed. But, while this is the case, there is as it appears to me one feature peculiar to this Arbitration considered in its International aspect. Most International Arbitrations, so far as I am aware, have been concerned with the exercise of belligerent rights, or with the question of territorial or maritime boundaries, which could only be determined by the principles of International law; but it so happens that the most important questions in this case—those upon which in substance it must ultimately turn—might have arisen between individuals, and might have come up for decision in any ordinary Court in either of the countries interested.

It is possible of course to conceive (though I think it very difficult), that the decision as between individuals might be different from that which it should be as between nations. I say this, because I know that is indicated in some portions of the argument on the other side, but still I think this is hardly a possible conception; and what I propose to do, therefore, as the only course which it seems to me can avoid prolixity, and may at the same time be of some possible use, is to assume that this case has come up (as it might come up), by one individual against another, to be determined by the ordinary courts of either of the countries interested, and endeavour to point out what considerations it would then have presented, and upon what grounds the case would have been disposed of.

Suppose for example it had been a claim, as it might well have been if these islands had been owned by a private individual—suppose it had been a claim by one of the owners of these islands against a pelagic sealer, for the destruction of a quantity of seals from the islands—you may say 1,000 dollars worth or 10,000 dollars worth; it is immaterial—and that it had come up for disposition in one of the ordinary courts of either country, in what shape would it have then presented itself to the judge, and in what way, or upon what grounds, would it probably have been disposed of? Now, I apprehend, the first thing that would have struck anyone in such a case would have been the absolute novelty of the claim, which at this stage of the world's history is certainly a consideration entitled to some weight. I think it would occur to any judge before whom it was brought to say:

If there is one principle better established than another, it is the freedom of the seas to all the world—the equality of all nations upon the high seas, and the right of all people to take whatever they may find there in the shape of free swimming fish or animals, as they may be able to secure them. I think it would be asked: how do seals form an exception to the universal rule? And with regard to seals themselves it would be very properly observed: The seals have been swimming the ocean—both the great oceans of the world, the Pacific and the Atlantic—and they have been the subject of pursuit by man, since long before the memory of man. Has there ever been up to this time a claim made by any nation or by any individual to property in those animals? That clearly must have been answered in the negative; and if the question were tested further, I think the explanation would have been asked: have you considered the analogy between all other animals of the same kind and of the same nature—animals *feræ naturæ*, as we may suppose these seals to be for the moment. I think the case would have been put of pheasants and rabbits and innumerable other wild animals, as to the law of which there is no question whatever, and the Plaintiff's would have been asked to distinguish between the claim made in this case, and a claim prepertes in seals animals and birds. I question myself whether the case would have gone further. Whether it would have gone further or not, however I venture to submit that the onus would have been on the claimant—that is to say, I think it would have been said to him: You must distinguish this case from the general right as regards the high-seas, and from the universal law prevailing as to animals *feræ naturæ*. This has been attempted here and I therefore proceed to examine, as shortly as I can, the grounds which are taken here, and which would have been advanced in a case of that description in support of the claim.

Now there is some difficulty—at least I have found some difficulty—in ascertaining exactly on what ground that claim is put; but first it may be well to say a word upon a question which would probably I think, in a contest of that description, either have assumed no place at all, or would at least have assumed a place even more unimportant than it has now been relegated to by the present contention of our friends. I am speaking now of what may be called the derivative title from Russia, and I think that may be put in a very few words indeed, as I should put it, viewing the Case as I am now endeavouring to consider it.

I do not desire to go into the Ukase of 1799, or to treat this question otherwise than in a very cursory manner; but if the question of the derivative rights of Russia and the Ukase of 1821 had come up for consideration, this much at all events would have been plain—that that Ukase was the cause of the Treaties of 1824 and 1825, and those Treaties were the result of that Ukase.

Now the assertion on the part of the United States is, that in those Treaties the phrase "Pacific Ocean" does not include Behring Sea, and that the term "north west coast"—(without going into details, or without speaking of the different meanings given to it) practically means the north-west coast south of the Alaskan Peninsula.

Let us look at the two or three documents upon which this substantially depends.

In the first place, there can be no question as to what the Ukase itself says, or as to its meaning. We should have to ascertain I think—we should have to ask ourselves—upon this question: What was it that the Ukase claimed: What was it that Russia asserted that they

were claiming by the Ukase? What did the United States and England understand them to claim? Against what portion of that claim—if not against all—did they protest; and how was their protest treated by Russia? Did she withdraw the claim, or only a part?

Now we find that the Ukase, to use the words of section I, which I read from the Case of Great Britain, p. 38, says that:

> The pursuits of commerce, whaling and fishery, and of all other industry on all islands, ports, and gulfs including the whole of the north west coast of America, beginning from Behring's Straits to the 51° degree of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South Cape of the Island of Urup, viz, to the 45° 50° northern latitude, is exclusively granted to Russian subjects.

No one would question what is the meaning of "north-west coast" in those words:

> The whole of the north-west coast of America, beginning from Behring's Straits,

Going southward.

> to the 51° of northern latitude.

There can be no question about that. Therefore the Ukase, at the beginning, puts a perfectly plain and unmistakable meaning on the words, "north-west coast."

Then that was transmitted to Mr. Adams on the 11th of February 1822, and his reception of it is to be found in his letter of the 25th of February 1822, in which he says: British Case p. 47.

> I am directed by the President of the United States to inform you that he has seen with surprise, in this Edict, the assertion of a territorial claim on the part of Russia, extending to the 51st degree of north latitude on this continent.

I take that to mean extending southward to the 51st degree of north latitude on this continent. He then continues:

> And a Regulation interdicting to all commercial vessels other than Russian, upon the penalty of seizure and confiscation, the approach upon the high seas within 100 Italian miles of the shores to which that claim is made to apply.

There, again, it would seem to me, we have Mr. Adams' very clear apprehension that it was a territorial claim of the coast down to the 51st degree of northern latitude, and an interdict of approaching, on the high-seas, within 100 miles of that coast.

Now M. de Poletica answers that in words which have always appeared to me, and I venture to say must appear to anyone, unmistakable and clear. These objections on the part of the United States to the claim of Russia having been called, as I understand, to their attention, M. de Poletica answers in these terms: British Case p. 48.

> I ought, in the last place, to request you to consider, Sir, that the Russian possessions in the Pacific Ocean extend, on the north-west coast of America, from Behring Straits to the 51st degree of north latitude.

Now is there any possibility of doubt as to what that means? They speak of "Pacific Ocean," and they speak of "the north-west coast." Can anybody contend for a moment that "Pacific Ocean" there did not include Behring Sea, or that the "north-west coast" did not include the coast up to Behring Straits?

It would be impossible to express that meaning in words more plain, more conclusive, or more clear—I do not know how it could be done. The Russian possessions—he asserts—"in the Pacific Ocean extend, on the north-west coast of America" . . . "from Behring Straits to the 51st degree of north latitude". The letter then goes on:

The extent of sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to *shut seas* (mers fermées).

and so on. I need not read the sentence again.

Then Mr. Adams answers that by saying: P. 49.

With regard to the suggestion that the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea, because it claims territory both on its American and Asiatic shores, it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, is not less than 90° of longitude, or 4,000 miles.

Now that applies to Behring Sea again, because it is only there that these territories belonging to Russia exist—I mean that the American and Asiatic shores are to be found opposite.

Then on the 22nd July (after some previous correspondence which it is not necessary to refer to), Mr. Adams writes in these terms: P. 50.

From the tenour of the Ukase, the pretensions of the Imperial Government extend to an exclusive territorial jurisdiction from the 45th degree of north latitude, on the Asiatic coast, to the latitude of 51 north on the western coast of the American Continent.

Is there and possibility of doubt as to what Mr. Adams understood to be the claim which was asserted on the part of Russia? He defines it in the words of the Ukase, and puts it in words which can admit of only one meaning, because from the 45th degree of north latitude, on the Asiatic coast, to the latitude of 51 north on the western coast of the American Continent, is practically going round in a semi-circle, so to speak. Then his letter continues:

And they assume the right of interdicting the navigation and the fishery of all other nations to the extent of 100 miles from the whole of that coast.

The United States can admit no part of these claims.

That will be found at page 50 of the British Case. Is it possible to state the claim more clearly, or to make the denial which followed more explicit, and comprehensive; could you have the assertion on the one hand and the denial on the other, and the issue which is joined between the two parties, more clear and distinct?

There we have the issue thus joined. The negociations then went on from that time, as you know, for a year in one case—for more than a year in the other: that is to say, the Treaty with the United States was made in 1824, and the Treaty with Great Britain in 1825. Both Treaties are to be found at page 59, worded in almost precisely the same way. The attitude assumed by Russia as the result of all these negociations is found in the Treaty signed by her. Article I of the Convention between Russia and the United States is as follows:

It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the High Contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determed by the following articles.

There was, therefore, a clear renunciation of any exclusive rights in the Pacific Ocean. Now I venture to say that at least this is clear: Unless you can find in the correspondence somewhere some change from the meaning of the words put upon them in the Ukase—put upon them by M. de Poletica in his construction—put upon them by Mr. Adams in his denial of claim, all doubt is at an end. I do not desire to pursue that further, because it has been gone into by the learned Attorney General very much in detail, and carefully.

It has been touched upon also by my learned friend Sir Richard Webster; and all that I venture to say upon that is this: that if there

can be found one syllable in the correspondence following the Ukase—following the claim—following the denial of the claim—which tends to shew that either Great Britain or the United States withdrew any part of their explicit and comprehensive denial, or that Russia reserved to herself any part of the rights she asserted by the Ukase, it has escaped my attention after several very careful readings; and I do not think there can be any object in my pursuing it further, because the Tribunal will have in their minds all the different correspondence which has been called to their attention on both sides. I think there are numerous expressions, and they are all to be found set out in our case, in which, so far from there being any change of the meaning or intention on the part of Russia or on the part of either Great Britain or the United States to be found, there are several letters which show quite plainly that both of those Powers were always adhering to their original denial, and that Great Britain and the United States considered that Russia had relinquished all that she claimed. And again I submit the test which was submitted by the Attorney General: Can anyone, reading that correspondence with care, point to any one time during the negotiations, when, if Russia had said either to the United States or to Great Britain, we will give up all our claim except Behring Sea, her condition would have been even listened to for one moment. If not, then there is an end of that question; and I am content to leave it there.

With regard to the question of maritime claim as distinguished from territorial claim, I think it may be said with truth that to both the United States and to Great Britain the more essential object was the maritime claim; but that perhaps there is some slight difference in this respect—that the United States, as would be natural, possibly attached some little more importance to the territorial claim than Great Britain did, because Great Britain evidently thought nothing whatever about it.

I was struck with one letter, which I do not think has been referred to in the course of this discussion, which impressed itself on my mind. and which is to be found in the second volume of the Appendix to the British Case at page 54. This letter was written in March 1824, and Sir Charles Bagot then represented Great Britain. They were then negotiating about the territorial question, which it was found difficult to settle, and all the negotiations were suspended.

Sir Charles Bagot said to Count Nesselrode that:

> If a territorial arrangement perfectly satisfactory to both parties could not now be made it might possibly be thought by my Government that our respective pretensions might still remain without any serious inconvenience in the state in which they had before stood, and that it would only be necessary for the present to confine their attention to the adjustment of the more urgent point of the maritime pretension, a point which would not admit of equal postponement.
>
> In reply to this observation Count Nesselrode stated, to my extreme surprise, that if the territorial arrangement was not completed, he did not see the necessity of making any agreement respecting the maritime question; and I found myself most unexpectedly under the necessity of again explaining very distinctly, both to him and to M. Poletica, that the maritime pretension of Russia was one which, violating as it did the first and most established principles of all public maritime law, admitted neither of explanation nor modification, and that my Government considered themselves possessed of a clear engagement on the part of Russia to retract in some way or other a pretension which could neither be justified nor enforced.

Now that struck me perhaps as the most emphatic piece of evidence pointing out the position taken by Great Britain. The territorial claim may wait; but when it is suggested by Russia, if we cannot settle the territorial claim there is no object in going on with the maritime claim

it can wait too, Great Britain says, not for a moment; that must be utterly withdrawn; it can neither be modified or explained—it admits neither of explanation nor modification; and some where, I cannot myself at this moment remember what the letter is, but there is a letter which Mr. George Canning wrote on the subject in which he says, I take it for granted the maritime claim by Russia will be altogether withdrawn.

On the 8th of December, 1824, in the British Case at page 46, you will find a letter showing also the attitude taken by Great Britain; but that has been referred to before:

> It is comparatively indifferent to us whether we hasten or postpone all questions respecting the limits of territorial possession on the continent of America, but the pretensions of the Russian Ukase of 1821 to exclusive dominion over the Pacific could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it.

The expression of Mr. Canning I have not at this moment before me, but it is of very little importance.

Now, you will not find, I believe, in this correspondence, which has been all gone over, and some of it repeated, anything approaching to a distinction drawn, on the part of Russia, in words, between Behring Sea and the rest of the Pacific Ocean.

Then, as to the claims of Russia by early discovery prior to the issuing of that Ukase and prior to the conclusion of these Treaties; I have only one word to say about that, because I think to some slight extent it has been a little misunderstood. I submit that it will be found, if you examine the papers, so far as it may become of any importance—and probably, in the view of the case I have suggested, it would hardly be worth while to mention it,—that Russia, by 1821, had not established any claim which she could successfully maintain against other nations north of the Alaska Peninsula.

If other nations had pushed their trade north of that Peninsula as they had at that time pushed it to the south, I submit anyone reading this correspondence will say that it would have been extremely difficult for Russia to resist their progress. All that there was at that time was one settlement, which was to be found on Bristol Bay, immediately north of the Alaskan Peninsula, in which (if I recollect rightly) the number of Whites was five; and that was a settlement formed in 1819 by Kossarovski. I find it difficult to reconcile the view taken by Mr. Blaine in one of his despatches of the early title of Russia with that taken by Mr. Adams at the time of these negotiations. At all events, there can be no question as to what the United States then thought of it, and while I say the United States thought comparatively little of the territorial title, though possibly they attached slightly more importance to it than Great Britain, I say that for this reason: if you refer again to our Appendix, Volume II, part 2, page 4, you will find that Mr. Adams there says:

> I inclose herewith the *North American Review* for October 1822, No. 37, which contains an article (page 370) written by a person fully master of the subject,

If you will look at the *North American Review*, which is given in our Appendix, volume I, page 33, you will find what is the view taken there, which Mr. Adams affirms to be, as I should understand, the correct view, because he says it is an article written by a person thoroughly master of the subject. What the writer says is:

> We readily concede to Russia priority of discovery, first occupation, and are by no means disposed to disturb her "peaceable possession",

that is quoting an expression used by M. de Poletica, in which he states that Russia's title was by occupancy, early discovery and indisputed possession.

We readily concede to Russia priority of discovery, first occupation, and are by no means disposed to disturb her "peaceable possession" of the Aleutian Islands and adjacent coast, including Cook's River, Prince William's Sound, and Behring Bay.

You observe all that is south of the Peninsula, and includes Cook's River, Prince William's Sound and Behring Bay.

We are not remarkably disinterested in making this concession, for, to all practical purposes, we would as soon contend for one of the floating icebergs that are annually detached from the polar masses.

That is the estimate and value which the United States then put upon that Country, and it was a natural estimate, no doubt, to form of it at that time.

In a territorial point of view, it is of little importance whether those distant regions are inhabited by the aboriginal savage or the Siberian convict.

And then they go on to say, as I understand (but I will not detain the Tribunal by referring to it) that the title by which Russia claims that territory, described by them as so worthless, is by no means clear and is subject to doubt.

Now Mr. Adams' view of the Russian title by early discovery and everything else at that time is to be found in the same letter to which I have already referred in our Appendix, vol. 2, part 2, page 4. That is a letter of Mr. Adams, of which we did not give all, and for the rest I am about to refer to the Appendix to the American Case, vol. 1, page 146. That is the letter of July 22nd, the same letter; but I do not find this passage in our version of the letter in our Appendix. My learned friend tells me it is in our Counter Case; but in page 146 of the American Appendix, vol. 1 of the Case of the United States, Mr. Adams there says:

When Mr. Poletica, the late Russian minister here was called upon to set forth the grounds of right conformable to the laws of nations which authorized the issuing of this decree, be answered in his letters of February 28th and April 2, 1822, by alleging first discovery, occupancy, and uninterrupted possession.

It appears upon examination that these claims have no foundation in fact. The right of *discovery* on this continent, claimable by Russia, is reduced to the probability that, in 1741, Captain Tchirikoff saw from the sea the mountain called St. Elias, in about the fifty-ninth degree of north latitude. The Spanish navigators, as early as 1582, had discovered as far north as 57° 30′.

As to occupancy, Captain Cook, in 1779, had the express declaration of Mr. Iamaeloff, the chief of the Russian settlement at Unalaska, that they *knew nothing* of the continent in America.

I will not pursue this subject. I have only cited that to show what Mr. Adams' view was of the claim then advanced by Russia, if they had thought it worth while to contest it or thought the territory of any value. The view which I submit to the Tribunal is simply this: If it had become a question between Russia claiming under the discoveries of Behring and Tchirikoff and England claiming under the discovery of Captain Cook in 1748, it would have been, to say the least of it, doubtful whether England had not a better claim, as Captain Cook had not only discovered the coast, but had landed and taken possession; while Tchirikoff had simply seen the coast at a distance and landed on an island; and Mr. Adams' goes on to say that landing on an island has never been considered to give a claim to the continent adjacent to it. I say that I find it difficult to reconcile his with Mr. Blaine's despatch of 30th June 1890, to be found in the 3rd volume of the Appendix to the British Case at page 498.

Mr. Justice HARLAN.—What you read was no doubt in the letter of the same date from Mr. Adams to Mr. Rush, on page 6 of your volume II, Part. 2. In the British copy that part you read is omitted.

Mr. ROBINSON.—Yes, I had noted between the first and second sentences, that there was this omission I do not know how it happened, but it is supplied in the Appendix to our Counter Case Vol. I at page 56, and, therefore, it is of no consequence. I looked at it before the Counter Case had appeared, and made that note, and had forgotten to take a note of the fact that it was put in in full in the Counter Case.

Mr. TUPPER.—I may be permitted to say that these papers of the United States correspondence were printed from the blue book published by the United States Government in Washington in the year 1888—a collection of all the papers relating to the subject—and they were taken in that way.

Mr. ROBINSON.—As we have it now it is of no great importance how it came to be omitted earlier.

But Mr. Blaine, I observe, writing on the 30th of June, 1890, Vol. III, Appendix to British Case, p. 498 says.

> If Mr. Adams literally intended to confine Russian rights to those Islands, all the discoveries of Vitus Behring and other great navigators are brushed away by one sweep of his pen, and a large chapter of history is but a fable.

Then he says at the foot of the page:

> Without immoderate presumption, Russia might have challenged the rights of others to assume territorial possessions; but no nation had shadow of cause or right to challenge her title to the vast regions of land and water which, before Mr. Adams was Secretary of State, had become known as the "Russian possessions".

Now you see that at that time the United States having bought from Russia were standing upon that title, and of course, it being their own title, it was only natural that they should make the most of it; but we have to contrast the position, taken by the United States in 1823 with the position taken when they had purchased the title of Russia and were resting upon it. This is what Mr. Blaine says here, which, as I have said, I find some difficulty in reconciling with the position taken by Mr. Adams; and I submit that you will find that the position of Mr. Adams is the right one.

In another place Mr. Blaine asks whether it is likely, if Russia's title had not been good, the United States would have paid the sum of $7,200,000 for the territory. I have not that passage before me at this moment; but of course the answer to that is very obvious. Whatever Russia's rights might have been, they were conceded and settled to be down to 54–40 by the treaties; and if the United States, forty years after the treaty, desired to acquire that property, it was necessary for them to pay for it whatever they might think it was worth; and I fancy that much as it increased between 1824 and 1867, it has probably increased more since that time.

So much then for those two points, which, in the view which I am endeavoring to take of the case, would have comparatively little bearing, but I think they may be disposed of by simply asking the Tribunal to read the words which I have read from the correspondence, accompanying the words of the Ukase, the words of the protest, and compare with them the words of the Treaty; and as to the other, so far as it is material, to contrast Mr. Adams' view of the title with that taken by Mr. Blaine, and examine, if it is thought worth while, the history of the discoveries up to that time, and see which is the most correct. I venture to think, as it is natural that it should be, that Mr. Adams,

writing near the time, and having studied the question, will be found the more accurate of the two.

Then, if we are now to proceed to discuss in this general way the property claim advanced by the United States, the first thing that one finds some difficulty in—at least, that I have found some difficulty in—is to ascertain exactly what form or what branch of their claim it is to which they attach the most importance, or mainly desire to stand upon, and by what law it is that they mainly desire to be governed. If I understand their claim, they claim a property first in the seals, if not in the seals then in the herd, if not in the herd, then in the industry; and they say that this claim is supported to all of these different subjects of claim by municipal law, and if not by municipal law, then by international law. For example, at page 132–3, in a portion of Mr. Phelps' argument, he says that upon the ordinary principles of municipal law, they claim to be supported, and upon the broader principles of international law it becomes much more clear; and while they say that international law must govern, and while they admit that the municipal law of both countries may well be referred to, and may have great weight in deciding what international law is, they yet say that it must be remembered that the case is not necessarily to be governed by the municipal law of either nation, but by international law. I think, therefore, it will be well for me, without attempting to draw that distinction more accurately, because it seems to me to be difficult, and would only complicate and prolong the argument, it will be better to turn to their claim as they state it generally, and see how it is put by them.

The Tribunal will find their propositions at pages 47, 50, 91 and 132 of the printed argument. I refer to their printed argument, I may say, for the remarks I wish to make, because so far as I know their written argument is not in any substantial respect departed from or added to by the oral argument. Of course it is very much amplified and illustrated, but I do not think it is varied in any respect, added to in any respect or departed from in any way; and therefore, as it is perhaps more convenient for reference, I desire to refer to the written argument of the United States. At the pages I have mentioned, you find the propositions which they say they have established, and upon which their claim of property rests. In the first place, they say that it is an easy thing, clear and intelligible to any ordinary mind, to appreciate the distinction between a property in the herd and a property in the seals. Well, I have only to admit with my learned friends my own utter incapacity to understand how that claim can be supported. If they do not own each individual seal in the herd, how can they possibly own the herd? I do not think it was an exaggerated or an unreasonable analogy which the Attorney-General suggested, to a fleet of ships. A fleet is a number of ships, just as a herd is a number of seals; and I do not understand that any different principle of law applies, whether the herd consists of a hundred seals or a hundred thousand seals, or as to a fleet whether it consists of ten ships or a hundred ships; and is it possible that a nation could say as regards her fleet precisely what they say as regards their seals: "It may be you may destroy in any distant part of the world one of our jolly boats, or a small vessel, and we would have no claim against you; but we claim that you must not injure our fleet in any way or incapacitate it in any way so as to, make it inefficient for the purpose for which it was designed. Surely it would be absurd even to state that; and why is it more intelligible when you endeavor to apply the same principle to a herd of wild animals.

I apprehend, therefore, and I assume, that you must consider only the property in the seals. There are other difficulties attached to any contention of that sort, and one difficulty which exists in regard to some of the propositions which have been advanced here, as it seems to me, is that in the first place the propositions are vaguely stated and difficult to understand, and in the next place, they are absolutely impossible to work out. What is said here is, and you find that in two or three places,—at page 105, for example, of their argument—they say the United States do not insist upon this extreme point, that is to say, the ownership of each seal, because it is not necessary. All that is needed for their purpose is that their property interest in the herd be so far recognized as to justify a prohibition by them of any destructive pursuit of the animal calculated to injure the industry, and consequently their interest.

I may say in passing that I at first thought there might be some distinction intended between property and property interest. I do not think there is, because I find at pages 50 and 91 they are used interchangeably. I cannot see for myself what distinction there is, and I do not think there is any intended to be drawn.

If that is what they claim, how is it possible to define or carry out that claim or enforce it in practice. The pursuit is to be allowed until it becomes destructive. Who is to determine when it is destructive? A or B is carrying on pelagic sealing. He has killed a hundred seals, or fifty, or whatever you may choose to say. He has not injured the herd. The United States comes in and says, "Do not kill the hundred-and-first seal, because then you will begin to injure our industry." It is impossible, I submit, upon any legal principle whatever, to advance a claim of that sort. They either own the seals, one and all, or they do not own them. It must be either the one position or the other, and the rights of others with regard to those seals if they are not theirs, unless there is malice, cannot be possibly made to depend upon whether the pursuit is carried to such an extent as to injure the industry founded and carried on by the United States. There are no means, in other words, of practically working out any such claim, nor are there any means of working out, if we are right, a claim of property in the seals. They feel the great difficulty, of course, of the inevitable result of their claim being to entitle them to say to any person pursuing a seal down at Cape Flattery, "That seal belongs to the United States; do not touch it"; and therefore they say they do not make their claim on that ground. But if that is the logical and inevitable result of the claim as they put it, they surely cannot make their claim a legal one or a sensible one by saying they do not want that result.

It is just the same with the Indians. When their claim comes in conflict with the immemorial rights of the Indians, Oh, they say, you may very well leave the Indians to us. We would not interfere with the Indians, provided they carry on their pursuit in such a way as not to hurt us. But the moment the pursuit of the Indians becomes an industry, then it must stop. In other words, we have a right because we have an industry, but the moment the Indians get an industry, then their right stops. Is there any way of putting that sort of claim to make it intelligible upon a legal basis and to a legal mind? And if all our evidence is correct—and I do no more than allude to it now, because it has been discussed once and may come up for further discussion when we begin to speak of regulations—if our evidence on intermingling of the seals is correct, it would be absolutely impossible to work out a property in the seals, for there would be no possibility of saying, when you find a seal

far south of the Aleutians, from which herd it came. Practically those two streams of seals coming from the Commanders and from the Pribilofs are like two water spouts. When the water gets so far down that it wholly overflows the land, it is impossible to tell from which source any part of the water comes. When those seals, pouring out from both islands, intermingle together in the Pacific Ocean, it is absolutely impossible to say from which place they come, or to which place they belong. It is impossible to get rid of the evidence we have adduced upon that subject by the very simple and utterly ineffectual course of saying "there is no identity; it does not exist".

That is the answer made to that in two places in the argument of the United States, p. 49, 103. They simply say as to identity, "There is no identity, and therefore it gives no trouble. There is no possibility of identity, for the herds are absolutely distinct."

The Tribunal will consider the evidence of our witnesses upon that subject, and see upon what ground you can say they are not to be believed. They are added to, I believe, or affirmed, to some extent, by the evidence adduced on the part of my learned friends; but I do not desire to discuss that now.

Again at page 138, they say, they do not admit there need be extermination by our pelagic sealing.

It is not necessary to the argument that this extreme result should be made out. It would be enough to show that the interest in question is seriously embarrassed and prejudiced, or its product materially reduced, even though it were not altogether destroyed.

That is merely another repetition of the previous assertion that all that they contend against, and all that they claim to be entitled to prevent, is the destructive pursuit, to the prejudice to their industry. I need hardly repeat that it must be their property at all times, or it cannot be their property at all. It cannot be their property the day after the first seal is killed which tends to injure their industry, and not the day before.

Senator MORGAN.—Do you, in the position you take, mean to assert that there is no legal restriction upon the right of pelagic sealing?

Mr. ROBINSON.—No legal restriction.

Senator MORGAN.—Yes. No legal restriction?

Mr. ROBINSON.—I should say no legal restriction. That I shall come to afterwards. Of course I need hardly say we are both of us anxious that there should be such restrictions as are reasonable and proper; but when you ask me whether there is a legal restriction, my argument is there is not.

Senator MORGAN.—If you will allow me, suppose the Canadians were to send ships enough to those three or four gateways, I will call them, passes, in the Behring Sea, to intercept the seals absolutely from going to the Pribilof Islands; and that was done in the high seas. Would they be within the purview, as you think, of the legal right of the Canadians?

Mr. ROBINSON.—As far as I know, I should think so. I would only say this: I have never myself seen the utility of putting extreme cases, which have not occurred and which never will occur.

Senator MORGAN.—It is insisted here that it does occur.

Mr. ROBINSON.—No. With great deference, sir, according to my recollection, there is no such assertion made.

Senator MORGAN.—It is made in the argument of counsel.

Mr. ROBINSON.—Then I can only say it is impossible it can occur. My recollection is—I have read to that effect—that the currents are so *strong* and the difficulty of fishing in those passes so great, that there

is very little sealing done there—in fact, none at all, my learned friend says, who knows the details more intimately than I do, though I have read them at various times. If that were done, all I can say is that I know of no legal principle which would prevent it; and I do not believe any lawyer could point me to any legal principle which would prevent it; but I have no doubt in the world—and that is the true answer to all these impossible suggestions—that it would be stopped by convention and by treaty. It would not be to the interest of either party or either nation to do such a thing, and it would be stopped in that way.

Senator MORGAN.—You think it could not be done under the powers conferred on this Tribunal?

Mr. ROBINSON.—No; I think not except under regulations. Do not misunderstand me. I mean you cannot declare the law to be.

Senator MORGAN.—A regulation when declared by the Tribunal has the effect of a law.

Mr. ROBINSON.—I have nothing to say against that. I am coming to regulations afterwards, if you will permit me to follow the line of my argument.

Senator MORGAN.—I am not trying to interrupt you, but I am merely saying that a regulation between these parties would be a law.

Mr. ROBINSON.—I quite understand that. Regulations might go to such an extent as to change the law. I am not at present arguing that question; but they would change the law to the extent to which they affect any rights which the law gives.

The PRESIDENT.—You mean the law between the parties?

Mr. ROBINSON.—The law between the parties; that is all, of course.

Senator MORGAN.—That is the law I was referring to, the law between the parties.

Mr. ROBINSON.—Yes.

The Tribunal here adjourned for a short time.

Mr. ROBINSON.—I find that with regard to the four questions there was one point as to which I intended to say a word, and unintentionally omitted it, as to the second question. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain? With regard to the doctrine of acquiescence I submit it is impossible to see how it can have any application in this case. A nation or an individual cannot acquiesce in any act until it is done, and it is utterly out of the question, and inconsistent with all the facts, to say that as far as Pelagic sealing is concerned Great Britain acquiesced in anything. There was no pelagic sealing before 1867, and there was nothing therefore for Russia to prevent. What we say is, and what the facts will show beyond all question is, that Russia, after those treaties, treated Behring Sea precisely as she and all the other Powers treated all the other high seas of the world. She did not assert or exercise any jurisdiction for the purpose of preventing anything that was not prevented by other powers in any of the high seas of the world. There was a question as to whaling, and when that was objected to, and her Authorities were referred to, they said it would be inconsistent with the Treaties of 1824 and 1825 on their part to attempt to prevent it.

In short, what other Nations desired to do, in exercise of the well understood rights of nations on the high seas, they were allowed to do in Behring Sea just the same as the other nations of the world did elsewhere. Russia never interfered to prevent it.

I admit this, for I think it would be reasonable: If it could be shown that Russia with regard to Behring Sea exercised a jurisdiction and prevented certain things being done which showed by irresistible infer-

ence that if pelagic sealing had been attempted there she would have stopped it also—then I think it could be argued with some show of reason that other Powers had acquiesced in her right to prevent it. If when they came to get what they thought was the only thing worth going for at that time, namely, whales, she had said we have jurisdiction here to prevent your coming and you must not come here to whale; under those circumstances I should have thought it would have been open to them to argue that as Russia had prevented whaling she might endeavour to prevent such operations as pelagic sealing—that is, it might be argued because she has prevented other nations from taking whales, it stands to reason if they had attempted to take seals she would have prevented that also. There would be then some ground to argue that she did exercise as to Behring Sea a sort of jurisdiction which neither she nor other nations exercised over other high seas of the world.

As a matter of fact, beyond all doubt or question, no single act of Russia can be pointed to, done by her with regard to Behring Sea, which was not done by all other nations with regard to all other oceans of the world. In other words, she permitted precisely the same rights in that sea as were open to other nations and exercised by other nations in other seas, and I do not understand how the doctrine of acquiescence, therefore, can have any application. Of course, before this Tribunal, I need not go into elementary doctrines with regard to acquiescence, such as that it implies knowledge, and you cannot acquiesce in a thing unless you know it is done. You might as well talk about a person acquiescing in the running of an electric railway, at a time when they were not known. There was no possibility of acquiescence in pelagic sealing, because it was perfectly unknown.

The PRESIDENT.—There was no prohibition against any sealing or whaling, or sea-faring industry, before the Treaty.

Mr. ROBINSON.—None whatever.

The PRESIDENT.—Before or after.

Mr. ROBINSON.—I cannot put it more strongly, or express it more emphatically, than to ask my learned friends, and indeed to challenge them, with respect to this point, to show anything that Russia did in Behring Sea which showed any peculiar or exclusive rights asserted by her over that sea.

Lord HANNEN.—There was a prohibition of trading with natives.

Mr. ROBINSON.—That was on the shore. I confine myself to maritime jurisdiction. There was a prohibition of trading with the natives, but that was what she intended to prevent, and what nations thought at that time they had a right to prevent.

The PRESIDENT.—There is no prohibition of navigation in the open sea.

Mr. ROBINSON—There is no prohibition of navigation in the open sea, and no prohibition of whaling or fishing of any kind.

The PRESIDENT.—There was a prohibition of navigating in territorial waters.

Mr. ROBINSON.—Yes, by the Ukase, but that was withdrawn. I am speaking now of the time after the Ukase. Between 1821 and 1867 there was no action of Russia prohibiting any action of any kind by any nation of the world in Behring Sea.

Senator MORGAN.—Except trading with the natives.

Mr. ROBINSON.—Except trading with the natives.

I do not like to repeat myself; but you will understand I am talking of trading on the high seas and maritime jurisdiction. Trading with

the natives is an act done as to the coasts, not with reference to the sea.

Senator MORGAN.—What reason could Russia have had for prohibiting it?

Mr. ROBINSON.—She wished to keep the trade of the country, I suppose.

Senator MORGAN.—What trade,—the fur trade?

Mr. ROBINSON.—I cannot say,—every kind of trade.

Senator MORGAN.—They had not any other that I know of.

Mr. ROBINSON.—No; furs would be the only thing they could get from the natives, but then they would take other things to the natives, and I take it the trade was in supplying things to the natives and getting in exchange furs. That is carried on on the coast, and has nothing to do with maritime jurisdiction.

Senator MORGAN.—That would depend on how it was carried on. Suppose it was in canoes?

Mr. ROBINSON.—I do not think that that would make the least difference, because canoes must land. It is true that I may trade in a canoe; but then I must land, and I do not think, if the natives should come out within the three-mile limit in a canoe, it would make any difference, because it would be within the territorial jurisdiction.

Senator MORGAN.—The general idea was that Russia asserted that they were interested in the protection of the fur-bearing animals.

Mr. ROBINSON.—Not that I know of especially. On paper she asserted unquestionably jurisdiction; but I do not talk about what she asserted, because she asserted it for a short time, and then withdrew it. If she did not, I am wrong; but, as a matter of fact, the rights she exercised were in no sense whatever exclusive as to Behring Sea, and I do not know any instance which puts an end to that argument more thoroughly and emphatically than the fact that she was asked to stop whaling in Behring Sea, and said she could not do it,—it would be contrary to her Treaties of 1824 and 1825. I have done with that, and I am sorry I omitted it in dealing with the first four points. I only call attention to it to show that the doctrine of acquiescence has no application whatever. It may be admitted that if she had done anything which would have implied a prohibition of pelagic sealing, if it had existed and she had known of it, it would have been open to the United States to contend that she would have prevented it.

Now, I was proceeding to consider the claim of property made on the part of the United States and the grounds on which they put it; and I have said I find a difficulty in ascertaining with satisfaction to myself whether they put their claim on municipal law or on international law, or on both. They have a right to put it on either or on any law, and in the alternative; and perhaps, therefore, it is better to discuss it without distinction. When I find, for example, that they refer to Blackstone for their propositions as they do, they are there of course claiming under municipal law; that is to say, they cite a long passage from Blackstone at page 44, and they say under that they have a right *per industriam*. That is a claim, of course, by municipal law. So I understand my learned friend Mr. Phelps' Argument at page 132, where he first says that under the principles of municipal law they would have a property, but, on the broader principles of international law their right is still more clear. There they claim it on both. They say in effect, "We have the right, in all these aspects, in the seal herd or in the industry"; and we have it under municipal law or international law, or both.

Now, what I desire to do is to call attention to the propositions which they themselves put—and I think I have referred the Tribunal to the pages at which they are found—as showing (and for that we are indebted to them) clearly and definitely the grounds on which they rest their claim to property. They are pages 47, 50, 91 and 132. I have attached great importance to these propositions as so stated, and I think they are not stated differently on these different pages, but that they substantially result in the same proposition. I attach importance to them for this reason; that I cannot but believe, looking at it as if I had drawn it myself, that those propositions are an attempt on the part of Mr. Carter and Mr. Phelps so to put their claims as to steer clear of all those principles of municipal law based on the analogy of other animals which they must feel had to be overcome.

We have then to ascertain—and I try first to confine myself to these claims based on municipal law—are those propositions true in fact? and if they are true in fact would they sustain the claim in law? I would desire to refer first to page 47, in which I think there is as much that is open to comment as on any other similar page in any other legal controversy that it has ever been my lot to see I refer to the printed argument of the United States. They say that according to the doctrines which they have adverted to, which are doctrines taken from Blackstone and Bracton, the essential facts which render animals.

commonly designated as wild the subjects of property, not only while in the actual custody of their masters, but also when temporarily absent there from, are.—

what they go on to state. Now I understand them to say, in substance, that what they are going to state practically renders animals which would otherwise be regarded as animals *feræ naturæ* animals of the domestic class or which have been tamed or reclaimed. I need hardly, of course, point out that there are three classes of animals—one domestic beyond doubt, which are born domestic and continue so; then there are animals *feræ naturæ*, born of that nature and continuing of that nature; and then animals *feræ naturæ* which by the act and conduct of man have had their nature so changed that they have been taken out of the class of wild animals and placed in the class of domestic animals. With regard to those animals they continue in the latter class only so long as their change of nature remains. We all know this, and I do not desire to delay the Tribunal in discussing elementary matters. I only refer to it to show how I view their proposition. Now they first say—

***the care and industry of man* acting upon a natural disposition of the animals to return to a place of wonted resort secures their voluntary and habitual return to his custody and power.**

Now let me ask, is that statement as applied to the seals founded in fact. Has it a shadow of foundation in fact? I think I may test that by this simple proposition. Is it possible to say that *you secure* a certain course of conduct by your act when, as a matter of fact, that result would have been more certainly secured, or at least as certainly secured, if you had done nothing.

Now that is putting it shortly, is it not putting it conclusively—Is there any answer to it? Can it be said that I secure something by what I do when that thing would have certainly happened if I had done nothing and had not been near the place. There is no logic in saying that a certain consequence happens from a certain cause, if the consequence would have happened without the cause. Would those seals

have returned if the United States had done nothing. Does anybody doubt it? If they would, how is it possible to say that the United States have secured the return?

Now that seems a short argument; but is there any answer to it? If animals are coming, and I know they are coming, and I get out of their way when I see them coming, in order to make certain that they will come, does anything I do secure their coming except my getting out of their way? Do the United States do anything more? Is it possible to say that they do anything more? If they showed themselves visibly, the seals would not come—we all know that. So much for this assertion.

Can it be said, with any show of reason,—I do not desire to enter into nice arguments,—can it be asserted, with any shadow of reason, that they secure their return? Let me ask, if there are other seals (and the illustration has been put before), as there well may be, for our knowledge is not complete—if there are other seals which resort to other Islands not yet known, as these seals do to the Pribilof Islands, what does man do on the Pribilof Islands, to secure their return to these Islands, that is not done on the other Islands to secure their return to those Islands? If they return to those Islands by the imperious, unchangeable instincts of their nature, as they return to the Pribilof Islands, has man any share whatever in securing their return? Unless it can be answered in the affirmative, our proposition is complete. Can it be?

If man were to disappear from the face of the earth, and leave the Pribilof Islands, it would be more certain that the seals would return than it is now, because it is just possible that something done by man might frighten some of them away.

Then the next statement we have is: that man secures their voluntary and habitual return to his custody and power. When you speak of securing the voluntary return of a wild animal—and for the present I am assuming they are wild animals though I know there is an indication throughout their case that they are domestic animals, either domestic animals by nature or because they are reclaimed—but assuming for a moment they are wild animals, what is the meaning of saying that they voluntarily return to the custody of man?

It either means nothing, or it means that they knowingly return knowing that man is there and wishing to be in his custody, just as a wild animal, reclaimed and tamed by me, returns to my custody and power, because I have induced it so to do by the expectation of food or something else which he can get from me. Numerous instances may be put. Suppose I have on my land a den of bears or any other wild animal—I do not care whether it is bears, pheasants, or rabbits. It is very possible that the bear may be returning and that he would not return if he saw me, but does return because I keep out of his way. Can I be said to secure his return? Can I be said to secure the return of the pheasant or rabbit? Much more can it, I think, be said there, because they would not return either to the preserves where pheasants are kept, or to warrens where rabbits are kept, in some cases, unless I provided food for them.

There may be in addition other inducements, such as shelter, or some other inducement ered to return, which is offered by me. There is absolutely nothing done on the Pribilof Islands; so that when you talk of securing the voluntary return to their custody and power, it is not by acting upon their instinct. I should have perhaps referred to that first—for the proposition is that by acting on a natural disposition of the animals he secures their return. How does man act on a natural disposition of the animal at all?

Again, I put a similar proposition to what I put before. He does not act upon their natural disposition in any way. On the contrary, he abstains from interfering with their natural disposition. He leaves their disposition to its own natural operation; and because he does not interfere with its action, because he does not prevent them from acting in accordance with it, he is said to act on their natural disposition. Now, I take it that "to act upon" there means something positive,—it must mean doing something to affect their natural disposition and to influence it. What man does is carefully to avoid interfering with their natural disposition, and to leave their natural disposition to its natural operation. If he did nothing, their natural disposition would secure their return. How can it be said then that he acts on their natural disposition? All that he does is to leave it to act by itself. Then if that is correct and accurate, the proposition, be it right or wrong, sound or unsound, well founded or ill founded, is so simple, that there can be no question about it.

If I am right in saying, that in either of those cases can you say he either secures their return or acts on their natural disposition, then that proposition is not true in fact. I mean it is not supported by the facts. Man neither does act on their natural disposition nor does he secure their return to his custody and power; on the contrary, if these animals knew that they were returning to man's custody and power they would not return. If the wild animal who comes on my land, to his den, knew I was there he would not return. It is because he does not know I am there that he does return; and if I were to show myself he would not return. How then can I be said, in any reasonable sense or use of language, either to act on their natural disposition, or to secure their return? If we are right it is impossible to assert that either of these things is done in the case of the seal; and, of course, the natural inference must be that this proposition is not supported in its application to these animals by the actual facts of the case; and it falls, therefore, without reference to law, because we have not the facts to which to apply the law.

Then it is said that having acted upon their disposition so as by that means to secure their return, it is done "so as to enable him to deal with them in a similar manner, and to obtain from them similar benefits, as in the case of domestic animals:" It is "the nature and habits of the animal which enable man by the practice of art, care, and industry to bring about these useful results that constitute the foundation upon which the law makes it award of property."

Now I venture to think, first, that he does not act on these natural instincts at all: and next, that if he did act on them, he would be doing only what every hunter does in the pursuit of wild game; and what is the invariable course pursued by all people who wish to get wild animals within their power; in other words, what are the invariable devices of the hunter? I can conceive many cases in which man does act on the natural instinct of wild animals, and in which he secures their return, or in which he secures their coming and submitting themselves to his power. I will take an ordinary case and put the illustration—I do not wish by any means to be extreme. The natural instinct of the wild duck is to light with its fellows. I act on this instinct by putting dummy fellows on the water, and I hide behind something to get out of the way. I am acting on their instinct there, so as to induce them voluntarily to come to the decoys and submit themselves to my power, and when they get within range I shoot them, and secure the useful result. Is not that the case with every wild animal?—I do

not care what it is—I do not care whether it is the case of ducks and putting out decoys, or the case of wild animals and putting out food for them—I do not care in what case you do it—it is just the ordinary device of the hunter to get the animals to voluntarily submit themselves to his power, and to come to the place where he can exercise power over them. Take the case of wild geese, which has been referred to. It may be said, there truly that man acts on their instinct. He imitates the call of their mates, and spreads food, and endeavours by every possible means to induce them to voluntarily submit themselves to his power and control; and if they do submit themselves to his control to such an extent as to come within range, so as to enable him to secure them, he does secure them, and with them the useful result.

But is there any result which the United States obtain here except the result of getting the animals' skins?—of being able to kill them and securing the produce? That, I venture to think, is the only useful result, if it can be called a useful result; and that useful result he does not obtain either by anything he secures or by any acting on their instinct. If, then, he does neither of those things, how can it be said, as it is said in the conclusion of that sentence, that it is the practice of art, care and industry on the part of man, which brings about useful results? What "art" does he practise, except that art which a hunter practises to deceive and delude wild animals? What industry does he practise except the industry of killing them and selling their skins? Is not every single element in that proposition unfounded in fact? If it be unfounded in fact, then it is unnecessary to discuss how far the law has any application to it.

I myself do not believe, or rather I submit that you cannot make out—unless these animals are domestic animals, which I shall speak of hereafter—that if all these things were done which it is argued would give property, there is any law to warrant such inference. Suppose they are wild animals—I am assuming, of course, all along, that they retain that class still and have not changed or been diverted from it by any act on the part of man—if they are wild animals, and if, as a matter of fact, man does act on their natural disposition to secure their voluntary return—it cannot be voluntary because if they knew he was there they would not come back—but if he secures their habitual return to his custody and power, so as to make the same use of it as in the case of domestic animals, so as to kill and eat them or sell them, and thus secure the useful result—if he does all that, what does he do with regard to the seals that the hunter does not do in the case of every other wild animal. He acts on their instinct and so secures their return, and obtains the useful result. I submit therefore that it is indifferent whether these facts which are here stated are true as facts, which I have endeavored to show that they are not, or whether they are not true. If they are true as facts we submit there is no law which, by reason of them, gives any property in the people who practise these arts.

My friend says this species of property is well described as property *per industriam.* Now you have only to read Blackstone or Bracton, or any other authority on the subject, and you will see that *industria* as there described is of a wholly different character.

Perhaps I may as well say here that it is difficult to conduct an argument of this sort in any sort of order; and there is a matter which may come in now well as at any other stage, a matter which has been already referred to: namely *animus revertendi*, and the application which, in my view, it has to this case. I submit as an incontestable proposition of law that it has no application whatever to this case, unless these animals

are tame and reclaimed; and then it can have no application unless there has been previous possession taken of them; and then that its only application, purpose or value, is as an item of evidence tending to show that they have been reclaimed; and as a necessary consequence from that, that it has no application whatever unless this *animus revertendi* is produced by the act of man.

Now, let us see whether that is a correct statement of the law. In the first place, in the case of domestic animals, *animus revertendi* has no application and no place at all, because it is not wanted. It makes no possible difference, if my horse or cow strays, whether they have the *animus revertendi* or not. They are my property wherever they go to, wherever I can follow them, and wherever I can find them. If a horse or a cow strays, it is often because of the instinct to get back to some place with which he is better acquainted, and in which he has lived longer. In the case of wild animals, it has no application, for a totally different reason. It is absolutely useless, and has no value as indicating or rather tending to prove property. A rabbit which leaves my warren and a pheasant which leaves my preserve have, unquestionably, *animus revertendi*; but that does not give me property in them. My rabbit may leave its burrow on my land, and may cross the boundary to my next neighbour, and while I am looking at it he may shoot it. I may protest against it, or beg him not to. I may tell him, "That animal has just left my land—it has got young on my land and will return to them: leave him alone." My neighbour may say, "I am very sorry; but he is on my land and I am going to shoot him." He may shoot him and appropriate him, and I have no sort of recourse. There is nothing clearer there than the *animus revertendi*. He does not deny it; he is not concerned to deny it, but he simply says, "Here is a wild animal on my land: if I can appropriate him to myself, I have a right to do it; and I am going to do it. Your protestations have no force or value whatever. The law is on my side, and I am going to take advantage of my rights under the law". I believe that is a proposition which nobody having looked into the subject will attempt to dispute.

If then *animus revertendi* has no application to either of those two classes, the only one remaining is those animals which, being born *feræ naturæ*, have become by the act of man so tamed or reclaimed that they have passed from the class of wild animals into that of domestic animals. And then, if you desire to prove that though once wild they have now become reclaimed, if you can show that they have a disposition to return and that that disposition to return was created by you, it might have some force and value as a piece of evidence to show reclamation and taming; otherwise it has none.

Take this simple instance. I catch a fox, or any other wild animal, I do not care what, and having got him I keep him for a day and let him go. He goes, and in his first instance of fright leaves my territory. Beyond all question he is going to return? He is going to return because he has got his home on my land and is accustomed to it, or he has got young on my land and natural instinct prompts him to return. But that has no weight or efficacy in enabling me to claim property in him, simply because I had nothing to do with producing it. If, on the other hand, I have kept a wild animal so long that by feeding it and taming it, or by confining it, when it leaves my place it intends to return, not in obedience to any instinct produced by nature, but in consequence of what I have done to it, and it desires to return to me for the purpose of protection or feeding, or whatever it may be which it is accus-

tomed to get from me, then I can point to that *animus revertendi* as evidence to show that I have reclaimed that animal, and that it has passed from the category of wild animals into that of tame.

But, in order to pass from one class into another, there must be a change in the animal's nature;—that is the whole story. There must be a change in the nature of the animal, a change to the nature of a domestic animal; and that change must have been wrought in it by man. Now, let us apply that to the seals. Can anyone pretend to say for an instant that any change in the nature of these seals, good, bad or indifferent, of any sort or kind has been produced by man? In what respect do the seals frequenting an uninhabited Island,—an island never yet discovered, or an island discovered, say, a week ago or a month ago,—in what respect do the habits and nature of those seals differ from the nature of the seals on the Pribilof Islands?

Unless it can be pointed out that there is some change in the nature of the animal which attaches and belongs to the seals of the Pribilof Islands, as opposed to the seals of the other islands that I have referred to, then it cannot be said that there is any change, or that the United States have produced any change; and the animal remains just as it was, a wild animal.

Senator MORGAN.—But you would not insist, I suppose, that the change in the nature of the animal from domestic to wild, when brought about by the interference of man, would give a right of property to any one who might capture it, as *res nullius*; as, for instance, if a man has a colt on his land, and by harsh treatment or in some other way alarms it so that it becomes as wild as a deer, he still would not have lost his property.

Mr. ROBINSON.—If I were to attempt, with deference, to answer that question, I should have to go back into speculation with reference to the nature and habits of animals which are hardly worth reverting to. I believe one great writer has said that all animals originally were domestic, and that those that are wild have been rendered so simply by the brutality of man.

Senator MORGAN.—But if you are right that a wild animal can be tamed, and becomes property because you have rendered it tame by kindness, cannot you turn a tame animal into an animal *feræ naturæ* by reason of your harsh treatment?

Mr. ROBINSON.—I must confess that I have never thought of considering that question as it could not possibly arise. At the same time I do not believe that I can make my cow a wild animal by any amount of brutality.

Senator MORGAN.—I should think not myself.

Mr. ROBINSON.—And, further, I do not believe that any law can be found to say so; but I can make a wild animal a tame animal, and there is abundant law for that. There are many cases where we find the law laid down as unquestionable, or at all events where it has not been questioned, and in such cases I do not trouble myself to hunt out whether the converse is true, or upon what the law stands, because I know that is the law.

Senator MORGAN.—If the dominion over it is the same without cultivation as with, it seems to me it makes no difference.

Mr. ROBINSON.—Yes, but I understand that what you suggest is a speculative view. You certainly can make a wild animal a tame one; but with reference to making a tame one wild, I can only say that the law does not allow it. I never heard of a law that allows it, and never

heard of a wild horse that once was a tame horse, or of a wild cow that once was a tame cow. I do not think the thing is possible. That is all that can be said.

With great deference, one could suggest excellent and natural reasons for it. I do not think a man who has bought a valuable animal and paid a large price for it loses his property in it simply because he treats it brutally and creates an aversion in the animal to him, and it therefore, becomes ferocious. We know that some horses are very dangerous, so in the case of Texas steers which occasionally roam the Streets of New York and frequently do damage, but I never heard that they were wild animals, though they are infinitely more dangerous and destructive than many. I can say nothing more as to that. With regard to the question you have put to me I reply there is no possibility in law of making a tame animal wild, while it is clearly possible to make a wild one tame. That is the only answer that I can give.

Then again, let me put what has been put by my learned friends within a very short time, and which I only advert to for the sake of a few remarks. What would be the result of this property being in the United States? They claim the finding that these seals are the property of the United States, which must mean that it is prohibited to all persons to destroy them.

I seldom venture to prophesy, and, I should not dream of doing it now if I were not prophesying in the Company of a person in whom I have the confidence that I have in Senator Morgan; but a speech of his was read here some time ago in which he says that the Pacific fisheries are destined to become more important than the Atlantic. For myself, having been to that coast several times, I may say that I think they will, and may become so in a shorter time than people who have never seen that part of the country are inclined to believe. When they do become of importance the seals in all probability will go, and no laws will save them, for the reason that public opinion will be against them. Whenever the seals come into conflict with the food fishes in that part of the world the fate of the seals is decreed; no regulations, no laws, no statutes, will ever be available or effectual to save them.

The PRESIDENT.—Perhaps you will have to consider that feature of the case on the question of Regulations?

Mr. ROBINSON.—I am bringing it to the attention of the Tribunal for that simple reason. It was well said, I forget by whom, that laws were like water, they could never rise higher than their source, that source being public opinion; and it makes no difference what Statutes are on the Statute-book, or what is the municipal law of any country. If that law has for its object to protect seals as against a food fish, in that part of the country the law, cannot be enforced because public opinion will be against it.

What is the effect of what our friends are asking this Tribunal to declare? That these seals are their property? It is quite impossible, if they are their property, to get rid of the effect of that finding, because they are their property wherever they go and whatever they are doing. No man has a right to destroy them. He must answer to their owners if he does. Now, if they should become injurious to the fisheries industry as they possibly may—and I say possibly because, confident as I am of the prediction alluded to, it is still only a possibility—we know that the canning industries are enormous and are growing year by year; and we know that the seals feed and feed in increasing quantities upon the fish which support those industries. Now, suppose the seals should gather at the mouth of the Fraser, where some of

these largest Canneries are, as it is only natural they should; and as, the salmon close in to go up the River the seals should also close in and destroy them?

Senator MORGAN.—Is there any evidence that they have ever done so?

Mr. ROBINSON.—There is evidence that they follow the fish.

Senator MORGAN.—But I am talking of the Salmon Fisheries at the mouth of the Fraser River or any other River?

Mr. ROBINSON.—If you ask me, if I have any evidence that, because salmon have collected at the mouth of the Fraser, therefore seals have, I cannot say that I have. But I am content to ask any member of the Tribunal if that is not to be apprehended.

Senator MORGAN.—I merely enquired if there was any evidence of it?

Mr. ROBINSON.—No; there is none.

The PRESIDENT.—Where is the Fraser River?

Mr. ROBINSON.—It is 6 or 8 miles to the north of Vancouver, near the line of the boundary.

General FOSTER.—That is an interior water.

Mr. ROBINSON.—Yes; it is an interior water.

The PRESIDENT.—Near to the line, of course, taken by the seals?

General FOSTER.—And it empties into an interior water.

Mr. ROBINSON.—Yes, just where the seals would come.

General FOSTER.—No; that is why I make the point, it empties into an interior water.

Mr. TUPPER.—Which connects with the Pacific Ocean.

Mr. ROBINSON.—At all events, I accept that statement. I know the Fraser very well and have been up it some distance.

The PRESIDENT.—Is it the mouth of a channel?

Mr. ROBINSON.—It empties into one of those channels; but, if General Foster has been there, I have nothing to say. I have been there, and have seen the mouth of the Fraser; and, if I was asked where it emptied itself, I should have said it emptied into the sea.

The PRESIDENT.—If you have both been there and cannot agree upon the facts, how shall *we* get on.

General FOSTER.—We are really both agreed.

Mr. ROBINSON.—At all events let me take the Skena, which is a British Columbian river. If the Fraser does not empty itself into the Ocean, it would make no difference, as we know from the evidence that seals follow the fish into interior waters, and I have read evidence and can point it out that they are found in interior waters following the salmon and schools of fish,——

Lord HANNEN.—Is there any evidence that they follow them up the Rivers?

Mr. ROBINSON.—I believe not.

Senator MORGAN.—In San Juan de Fuca they pass in. Would it incommode you, Mr. Robinson, if I asked you a question for my own information?

Mr. ROBINSON.—Indeed, it would not, Sir.

Senator MORGAN.—I wish to know what you call interior waters are those lying behind Vancouver Island and along the coast,—are they navigable waters?

Mr. ROBINSON.—Yes.

Senator MORGAN.—Are they navigated by the ships of the world?

Mr. ROBINSON.—Yes.

Senator MORGAN.—Going up and down the coasts of British Possessions and Alaskan Possessions?

Mr. ROBINSON.—Yes. You probably know this, that there is regular navigation between Victoria and Vancouver, and that is Inland Waters. It is an archipelago of Islands. I have been there, and can speak to that. If you turn and look on the Map, you will see it in a moment.

Senator MORGAN.—Those waters lie between the Islands and the main Continents, and are navigable waters?

Mr. ROBINSON.—Oh! yes, I think so.

Mr. TUPPER.—It is a Steamer route.

Mr. ROBINSON.—It is the popular tourist route from Victoria and San Francisco. In point of fact it runs along that archipelago, and that forms the attraction of the route. It is one of the peculiarities of that coast from Vancouver to San Francisco, if I am not mistaken, that it is an open coast devoid of islands or harbours, but from Vancouver north it is a continual archipelago. It would make no difference in my argument whether the seals come into the interior waters to get the salmon as they are preparing to pass up the Fraser or into the ocean—I had, perhaps, better take the Skena in British Columbia, which I believe passes into open water. I have not spoken of it before, and I do not speak of it positively, but I know a canning industry is carried on, and that the salmon brought from the Skena—which is another illustration of some interesting statistics that my friends have stated—is said to be of a finer character than the salmon that come from the lower waters. When speaking of canned salmon I have heard it said, "Get it from the Skena." Then take that river. Suppose the seals collected there to prey on the salmon, and seriously to interfere with the canning industry, as they will do if your view, sir, should be sustained, as it may be in a short time—probably in our time and before very long—that those fisheries will become of immense importance: on that day those seals will be doomed. They will have no friends. Public opinion will be against them, and they will be exterminated. Is it possible that an animal as to which that can be said with truth can be the property of an individual so that he can own it wherever it goes and be entitled to protect it?

When we add to that what is not improbable—for we know, that sealskins, which are an article of luxury and taste, may diminish in value, that the taste for them may diminish, and that the seal industry would then be of little importance and yield little return, and might not be worth carrying on, while the industry connected with the food fish must be of increasing importance, and of enormous value, and of absolute necessity to the population as a means of subsistence—when we say that that may happen, how is it possible to talk of protecting the seals, not now, but for all time, by giving them as property to any particular nation or individuals. The thing is impossible, because it would be contrary to every interest of the world, and to every reasonable principle.

Therefore I say that that forms another reason why this claim of property is not possible on reasonable grounds. I am not going now into nice principles of law or citations of authority. I am talking to reasonable men; and on reasonable principles I ask is it possible to assign any property in these animals that will give a right to protect them irrespective of the circumstances, as they may change from time to time, and as the interest of the world may require them to change? If not, it is not possible to assign property in these seals to any particular nation or to any particular individual.

If I were to ask any ordinary person what the seal is—and I am recurring for a moment to its character in natural History—what is a

seal? I think the answer would be without question that it is a marine animal, a free swimming animal of the Ocean, and the property of anybody who can take it.

But if we ask my learned friends here what is the Alaskan fur-seal, the answer is that the Alaskan fur-seal is a terrestrial domestic animal and belongs to the Government of the United States.

Now for what reason or on what ground is it that the fur-seal of Alaska differs from all other fur-seals of the world which have yet been discovered, because that is the result of the definition now assigned to them, that they are terrestrial and domestic animals and the property of the United States, the ordinary fur-seals and hair-seals all over the world being marine animals according to the classification of all Naturalists, and animals *feræ naturæ* belonging to nobody?

While I am at that point I may ask—a question which has always been to me one of doubt and perplexity. It is not of great importance, and my learned friends may therefore—perhaps I should not say "therefore", because I believe they would do so whether it was of great importance or not—endeavour to clear it up for me. I find in the United States Case at pages 295 and 296 as one of the propositions which they say they have established, that it never mingles with other herds. At page 295 they say that the Alaskan fur-seal is essentially a land animal, and then I find on the next page it is said it never mingles with any other herd, and the identity of each individual seal when in the water can be established with certainty. I really do not know what is the meaning of that assertion. I have seen seals in the water, and how it is possible for anybody to say that at all times, when in the water, the identity of each individual seal can be established with certainty, I have been unable to understand. I do not think it is of great importance what is meant by it, but how the statement came into the case, and how it is to be supported, I do not know.

If you knew each seal, as the President once suggested, as the shepherd knows his sheep, in the millions, it would be impossible to tell them individually, even if you were alongside of them, and I do not know why that allegation is put in or what is the meaning of it. I thought it meant the identity of each seal-herd; but even then it would be wrong, unless it means that it can be established with certainty by reason of its position and locality. If they mean to say the identity of each seal-herd can be established, because you only find one herd on the eastern coast and the other on the west.

Lord HANNEN.—That is the meaning of it, I think. It says it never mingles with any other herd.

Mr. ROBINSON.—That probably may be so.

Lord HANNEN.—It means the identity of seals belonging to each herd.

Mr. ROBINSON.—Yes, that is the only construction that can be put upon it; but it is certainly not put plainly. I know it has struck others besides myself, and I mention it, because I have not known what was intended by it.

Then, further, with regard to its domestic nature, one thing is absolutely certain, if you look at our Counter Case. I do not delay to read extracts, but at page 113, there are numerous extracts which show that the seal is an animal very easily frightened and terrified, and is subject to what we call stampedes. There are numerous extracts given there which show it is a timid animal.

I need not stop to read the extracts, nor to insist upon the proof, for we have it in evidence that all precautions are taken by the United

States upon the Islands for the purpose of keeping men out of their sight, and of not going near them, not frightening them, not terrifying them; they will not allow men to smoke; they will not allow them to whistle; they will not allow a noise; they will not allow dogs—every possible precaution is taken to avoid frightening the seals or acting upon their peculiar sensibility and timidity.

In addition to that, how can you call an animal a domestic animal when it is beyond all question that for eight months of the year it disappears altogether; its master cannot follow it, or identify it; its master does not know where it is; and it would die if it remained with him? If they, here again, insist on the *animus revertendi* at the end of that time, I would say, what probably I should have better put in its proper place, there is no instance I know of in which the migratory instinct of returning to any place has been relied upon as *animus revertendi* tending to enable a person to acquire the right of property, or where it has been called the *animus revertendi* to which the law applies. If there be *animus revertendi*, what has puzzled me in this case, and I should like very much to see if it can be answered satisfactorily, is, who has the best right to claim the *animus revertendi*. The nations who are all interested in the Pacific Ocean may say they have the *animus revertendi* to the Ocean, imperious and unchangeable,—more imperious and more unchangeable than to the Pribilof Islands, for this reason: if the Pribilof Islands were submerged the seals would find another place,—I do not think anybody doubts that, though in my learned friends' Case it may be doubted,—but I do not doubt that if the Pribilof islands were tomorrow submerged these seals would find some other place to haul up and breed on, while if anything happened to the Pacific Ocean those seals must die. They must feed; they must go out to the sea and cannot remain on the Islands. Then I put myself in the position of a person interested in pelagic sealing in the Pacific Ocean, or a nation interested,—all rights being equal among us. They say "when those seals leave us they must come back to the Ocean by the imperious instincts of their nature, and not only that but all the food they get they get in the Ocean, and not only that but they would die if they did not come back to the Ocean. If *animus revertendi* has any application at all, why cannot it be claimed as much at one end as at the other?"

Take the ducks, take the geese, the northern ducks, as we know being bred, many of them, within the Arctic Circle. They have the *animus revertendi* there, and the Esquimaux may claim them because they come there to breed and have the *animus revertendi*.

The PRESIDENT.—Would you not make any difference between the *animus revertendi* to a place which is the property of a nation and the *animus revertendi* to the ocean, which belongs to nobody?

Mr. ROBINSON.—None that I can see. I had thought of that, Mr. President, but there is not—I speak, of course, subject to correction if any difference should occur to you—I am not aware that there is anything that can make any difference in the principle. The learned President of course understands what I mean. I mean for the purpose of giving property I am not able to see any difference. There is a distinction, not a difference.

The PRESIDENT.—I merely inquired what was in your mind.

Mr. ROBINSON.—There is a distinction; but is it a distinction which makes a difference in legal principle? I have not been able to see that it can do so.

So, then, the *animus revertendi*, I submit, is out of the question. We now come to another subject. I have endeavored so far as I am able

to discuss this question upon the principles of municipal law which they say apply to it, and which they say distinguish it from all other animals *feræ naturæ*, which they say make it a domestic animal; and if it is to be a domestic animal I venture to say that it must be a domestic animal by its nature. I have had this difficulty also, that in some parts of my learned friends' argument I find statements from which I should gather that they claim it to be a domestic animal by nature, and in others I find statements which go to show that their argument is that it is a domestic animal made so by them, although a wild animal originally. One thing I think is clear, that unless it is a domestic animal by nature they certainly have not made it one; and I think they are driven back in some portions of their argument.

Lord HANNEN.—What is a domestic animal by nature?

Mr. ROBINSON.—I can say nothing more than it is a domestic animal by nature. I hardly know how to describe it, except that I would say that it is an animal which has a domestic nature. Lord Hannen will remember the question that was once asked, what was an archdeacon, and it was said he was a person who performed archdiaconal functions. I really do not know that I can say what is a domestic animal by nature, except by saying it is what we recognize as such.

Lord HANNEN.—You seemed to be relying on the distinction, and therefore I wanted to know what you meant.

Mr. ROBINSON.—If Lord Hannen asks me my opinion I can say at once that I think there is a plain distinction between an animal which is a domestic animal by nature and an animal which has been temporarily brought within the class of domestic animals by reason of the industry or art of man exercised upon it.

There is just this difference: That a domestic animal proper remains a domestic animal forever, and must remain a domestic animal forever; it was born so, and must die so; but an animal that has been tamed and reclaimed belongs to the class of domestic animals only so long as it retains that nature. If that animal should escape and regains its wild nature then it relapses into the class of wild animals.

The PRESIDENT.—Do you regard the bee as a reclaimed animal or as a domestic animal?

Mr. ROBINSON.—I should say when the bee is hived and reclaimed, as they put it, then it would be a reclaimed animal. You get your property in bees, as Bracton says, by reason of occupation and hiving. If that occupation and hiving has been such as to give you a property, it is because you have reclaimed it.

The PRESIDENT.—Then the bee, you think, is an animal *feræ naturæ*.

Mr. ROBINSON.—I should say it was originally a wild animal, but when you come to hive them and confine them, you make them for the time tame. That is you bring them into that class.

The PRESIDENT.—The reclaiming is the hiving?

Mr. ROBINSON.—The reclaiming is the hiving and confining. Yes, sir.

The PRESIDENT.—Confining?

Mr. ROBINSON.—Confining it in the hive. I will not say confining, because it is perhaps hardly a proper expression to be used.

Lord HANNEN.—Homing.

Mr. ROBINSON.—Homing; yes sir. Of course you have the power of confining them, as my learned friends say.

The PRESIDENT.—Putting them into the hive.

Mr. ROBINSON.—Putting them in the hive, and their coming back to the hive and living in the hive, and your providing shelter, food, etc.

If it comes within any of those classes it must come within the class of reclaimed animals. That is to say it is temporarily in that class. I do not know how else I can put it. I may say that there was a case reported only the other day—possibly it may have attracted the attention of some members of the Tribunal—in which the question of the length of time that is necessary to confine a wild animal in order to bring it in that class came up. It is perhaps known to some of the Tribunal that there is a law in England for the prevention of cruelty to domestic animals; and the Humane Society proceeded against persons who were carrying on in some of the northern counties the game of rabbit coursing. It was said that these rabbits had been kept for a week or ten days in confinement prior to turning them out to course, and that they had thereby become domestic animals. Mr. Justice Wright held that he could not possibly say that that made them domestic animals; and the paper, which seemed to agree with that, said they feared there was no doubt that the decision was correct, but they wished it could be otherwise.

The PRESIDENT.—Do you think a hived bee would fall under that law?

Lord HANNEN.—I do not think cruelty to animals is extended to bees.

Mr. ROBINSON.—I do not think it is; though I am afraid they are subject to a great deal of cruelty very often in order to get at their honey.

I pass then to those propositions which my learned friends assert are founded either on international law or the law of nature; and so far as I can understand they are the same. I find that what my learned friends assert in substance, if I can properly state it in substance, is that international law is founded upon the law of nature. Differing from the view of the learned Attorney General, they say that whatever part of the law of nature is not rejected in international law may fairly be presumed to be assented to, and therefore that anything they can say comes within the law of nature, if you cannot discover that international law has rejected it or dissented from it, forms part of international law. I venture to say that is contrary to all theories upon which international law has hitherto been founded. But we may at all events take for a moment the different propositions which they found upon that. They go at great length into a discussion or disquisition of the original principles and foundation of the institution of property, from which they deduce certain principles. I can only say of those principles that they find no place in the municipal law of any portion of the civilized world. They may be valuable abstract discussions. They may be very useful speculative theories for the guidance and assistance of those who are making laws, in order to decide how far it is advisable, how far it is practicable, to make their municipal law conform to them; in other words, how much of the principles laid down and enunciated by these authors as part of what they are pleased to term the law of nature, it is practicable or useful or desirable to incorporate into their municipal law. For any other purpose I venture to say that they are absolutely useless, because not only are they not founded on any positive system of either municipal or international law, but they are theories which it would be utterly impossible to incorporate into any system of laws with a view to carrying them out.

Let me for a moment turn to the first assertion which is made—and I think it is perhaps a typical assertion—with regard to this property, founded upon that law. They assert that they are trustees: That this property is not their own, that they are trustees of it for the civilized world, and are conferring upon the civilized world the blessings which

sealskins will inevitably bring to those who can afford to buy them; and they say that that is an obligatory trust. My learned friends differ about that however; and I do not wonder they differ about it. My learned friend Mr. Carter, at one page which has been pointed out, asked if anybody can doubt that it is an obligatory trust; if it can be doubted that, if a nation having that trust incumbent upon it were unfaithful to it, other nations could intervene and depose the unfaithful trustee. My learned friend Mr. Phelps, as I understand, founds to a certain extent, though I am quite free to admit more guardedly and cautiously, his claim to property upon that theory. He says that if the only object of the United States in keeping this property is to allow pelagic sealing to exterminate it, of course they are free to destroy it, and that their abstinence therefore entitles them to a property. There is another place where I had found an extract in which it was said they had a right to destroy it. I must look for that again, for I have not the reference just now. But at all events there is that difference of opinion.

After stating that, they state that self-interest is a sure guarantee for the performance of those trust obligations. They say that that trust extends to the means and capabilities of a nation for production, and that those who are wronged by a breach of it have a right to redress the wrong, which would be nothing but a removal of the unfaithful trustee. Then they go on to add that this fundamental truth, that this useful race is the property of mankind, is not changed by the circumstance that the custody and defence of it have fallen to the United States, and if the world has a right (as it certainly has) to call on the United States to make its benefits available, they must clothe them with the requisite power.

Now in discussing this question I would like to say, first, from what point of view I approach the discussion of any question of trusts. I know nothing whatever of trusts except what I find laid down in certain treatises in America and in England. There are treatises of acknowledged authority on that subject both on the other side of the water and on this side.

Before I proceed I should like to recur a moment to another matter. I find at page 554 that Mr. Coudert, in arguing as to the question of property, unfortunately forgot himself, or at all events he stated views which were diametrically opposed, as I understand it, to his colleagues. He says:

> To put an extreme case, suppose it were deemed important by the United States to kill every seal upon those islands, what nation in the world would have a right to find any fault? What nation in the world would say if it were deemed good policy,—if it were advantageous to us—if there were a profit in it—would any nation have a right to say that it is not our property, and we have not a right to kill them for our useful purposes? I take it that the best test of an exclusive property right is the question whether or not any other human being has a right to interfere.

You can reconcile that to a certain extent with what is said in Mr. Phelps' argument, but you cannot reconcile it with Mr. Carter's argument. My learned friend Mr. Coudert, I know, ought to have followed one of my learned friends or the other; but my own interpretation is that he was not thinking at the moment of making his choice. He was surprised for the moment into assuming the position of a lawyer. I think he forgot for the moment that he was arguing theoretical and metaphysical questions; that his old training returned to him, and he enunciated ordinary common sense law for a moment. I think that is the explanation of Mr. Coudert's unconsciously asserting a doctrine so

diametrically opposed to the arguments of my learned friends, but so useful for his then immediate purpose. When a lawyer trained in the doctrines of the common law and municipal law is discussing a question of property, and is told that it must be discussed not upon principles which he finds laid down in any system of law, but upon abstract theoretical propositions not of what the law is, but what it ought to be, and those are the propositions he is endeavoring to support, he is very apt indeed to forget himself, and to say. "Surely I have a right to destroy these things: they are in my power. Who could interfere with me, if I chose to destroy them all? Is not that the best proof that they belong to me?" I think Mr. Coudert forgot for the moment the propositions which it was his purpose to support. But however that may be, and founding my knowledge of trusts upon nothing in the world but upon those treatises which I have referred to, let us make those few inquiries which every one would make when he was told that a trust was asserted and was denied. I think the questions would naturally occur to him, How was the trustee appointed? What is the nature of the trust which he is to perform? How is the performance of that trust to be enforced?

Now then, let us see how this trustee is appointed. Who are the *cestuis que trusts.* Who appointed the United States trustees of these seal islands? At page 137 it is said that the interest of Great Britain in the preservation of the seal herd is almost as great as that of the United States. Great Britain, then, is one of the most influential of the *cestuis que trustent.* But Great Britain is here objecting to the assumption of this office of trusteeship by the United States. Great Britain says, "If I have any interest in this seal herd—and I either have or have not—I am of age, and I wish to manage my own property for myself." On what principle is she not to do it? We are talking now about trusteeship. The other nations of the world, so far as we know, have neither assented to nor dissented from the assumption of this trusteeship on the part of the owners of the islands. Then, what is the next thing to be considered. Who are the trustees? They are the persons who have the largest interest, beyond question, in the trust property, and their interest is diametrically opposed to that of the persons holding the next largest interest, for whom they appoint themselves trustees. It is contrary to all one's ordinary notions that they should be the trustees appointed: because their interest and the interest of the *cestui que trustent* do not concur.

Then let us ask what is the nature of this trust? The trust is to sell the trust property to the *cestuis que trustent* at a price to be fixed by the trustees. Can you conceive a trust like that? It may be a trust according to the law of nature; it may be a trust according to international law; but is it a trust according to any other law that any lawyer ever heard of?

Senator MORGAN.—*Trust in invitum.* What is that?

Mr. ROBINSON.—I hardly know. If you will explain what you mean by a *trust in invitum.* I am not quite sure what you have in your mind.

Senator MORGAN.—A trust imposed upon a man by the attitude that he holds to a particular piece of property.

Mr. ROBINSON.—Yes; there may be such a thing.

Senator MORGAN.—Of course there is.

Mr. ROBINSON.—Yes; I should say there is; but I am not aware of any instance in which there is any trust even in the remotest degree approaching this trust. I am quite aware that a man could hold some

property which would make him a trustee, and I am also aware, as a general rule, that people would rather not be trustees; but I do not understand a trust, the nature of which trust is to sell the property to the *cestuis que trust*, and to fix your own price upon it. Then it is not a price, recollect, to be regulated by what it may cost the trustee for the performance of his trust, what it may cost him out of pocket, or for his time required to perform the duties of the trust. On the contrary, I find in Mr. Palmer's letter that 18 months before he wrote, it was generally supposed this property would pay to the trustees an interest on the outlay of two thousand per cent.

Now, under these circumstances, is it any wonder that other nations, contrary to all the usual rule in trusts—because if there is one thing better known about trusts than another, it is that a trust is said to be an onerous and thankless office, which every one is unwilling to undertake, and which everybody is anxious to escape from—surely it is no wonder that the other nations of the world, and England in particular, are very anxious to range themselves among the trustees in this case, rather than to be numbered among the *cestuis que trust*. It is a very unusual case, but it is the case here. England says, "I would rather help you in discharging the benefits of this trust to the world. I would infinitely rather assist you and be trustee, than retain the position which you are good enough to assign me of *cestui que trust*." Is there any reason why she should not do it?

However this may present itself, in whatever almost ludicrous aspect, is there anything contrary to the facts. Is not that the exact nature of the trust which the United States are assuming; and they are assuming that trust upon the plea that they are conferring blessings upon mankind. This is certainly the most attractive form of philanthropy ever heard of, and all men would be very glad to practice it if they only could get the opportunity. To assume the trusteeship of a property out of which you make a thousand per cent, and have at the same time the blessing of an approving conscience and the satisfaction of conferring blessings on the world, is a thing very desirable, if it can be attained by law. But it is no wonder that other nations think that this trusteeship, so peculiar in its character, and peculiar in its benefits, should not be altogether assumed by the United States.

Then how is the performance of this trust to be enforced? It is carefully stated that it is beyond question. Perhaps I had better read that sentence, because I do not wish to over-state or under-state anything. At page 92 of the United States Argument, it is said:

> It is in the highest and truest sense a trust for the benefit of mankind. The United States acknowledge the trust and have hitherto discharged it. Can anything be clearer as a moral, and under natural laws, a legal obligation than the duty of other nations to refrain from any action which will prevent or impede the performance of that trust?

At page 59 the same subject is recurred to, and at page 61 it is said:

> It is the characteristic of a trust that it is obligatory, and that in case of a refusal or neglect to perform it, such performance may be compelled, or the trustee removed and a more worthy custodian selected as the depositary of the trust.

Now, let me ask in all seriousness—for that must be meant seriously or it is not meant at all—supposing Great Britain, as the most largely interested of the *cestuis que trusts*, should believe, and have good reason to believe, that the United States were unfaithful trustees; that they were wasting the trust property; that they were mismanaging it; that they were not conferring the blessings upon Great Britain in particular—for I do not think she would trouble herself much about the rest of

the world—which she had a right to obtain from it; and supposing she were to say to the United States, "We desire to remove you; you have been unfaithful to your trust; we propose to take possession of the Pribilof Islands, and put in a trustee who will manage them better": could any body doubt for a moment how the proposal would be received! Do you think there would be any arbitration about that? Do you think there would be met in any way but at the cannon's mouth, in an attempt to compel the performance of that trust; and is it really possible seriously to discuss this question,—how can the existence of a trust in this case be made to conform to any known system of law or to any ordinary rules of common sense?

There are other propositions connected with this matter, which it will not take any great length of time to discuss, but which, as it is now 4 o'clock, had perhaps better be postponed until tomorrow.

Mr. CARTER.—Mr. President, before the Tribunal separates I will give the reference which Lord Hannen, I think, asked for, as to the statutes conferring jurisdiction upon the United States Court of Alaska:

The act providing Civil Government for Alaska, which is contained in volume I, page 481, of the Supplement of the United States Revised Statutes is a special act, and section 3 is as follows:

Sec. 3. That there shall be, and hereby is, established, a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with the act, as may be established by law.

It will be perceived that it refers to the jurisdiction of the district courts as the measure of the jurisdiction which it possesses.

Then the United States Revised Statutes, section 563, is as follows:

The district court shall have jurisdiction as follows:

Quite a number of cases are mentioned, among which is.

Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. (And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine.)

I should say that that paragraph refers to cases where prizes are made in consequence of any insurrection in the United States—a recent amendment, not particularly applicable.

Sir RICHARD WEBSTER.—Would Mr. Carter kindly let us have the book, in order that we may look at it. I mean to say I should like to follow it out. It seems to me as though that was giving what we should call jurisdiction *in rem* and jurisdiction *in personam*, and that it was not made a prize court in the sense in which we have been using the expression.

Mr. CARTER.—The paper is here, Sir Richard.

Sir RICHARD WEBSTER.—It had better appear upon the note. It will go upon the note, and I will see it.

The PRESIDENT.—The Tribunal will meet tomorrow at 11 o'clock for private consultation; and at the issue of the private consultation the public hearing will begin.

[The Tribunal accordingly adjourned until Thursday, June 8, 1893, at 11 o'clock A. M.]

THIRTY-FIFTH DAY, JUNE 8TH, 1893.

Mr. ROBINSON.—I may perhaps, before continuing, complete two references which I had not at the moment before me, as I ought to have had yesterday. One was to a letter from Mr. George Canning of the 29th of May, 1824. It is to be found in our Appendix, Volume 2, part I, at page 61. It is not of very great importance, but these are the words I refer to:

> We take for granted that the exclusive claims of navigation and jurisdiction over the North Pacific Ocean, which were put forward in the Ukase of September, 1821, are to be altogether withdrawn.

And I refer as well to Mr. Blaine's words in the 3rd volume of our Appendix, page 498.

> If we take the words of Mr. Adams with their literal meaning there was no such thing as Russian possessions in America, although 44 years after Mr. Adams wrote these words the United States paid Russia 7,200,000 dollars for these possessions, and all the rights of land and sea connected therewith.

Now, I am not sure, if Mr. Senator Morgan if you will allow me to say so, whether, misled you yesterday in any way in explaining the position of the Fraser River as to where it comes out. Of course, it is not in the open sea in this sense, that Vancouver Island is between it and the main Pacific Ocean; but where it debouches at its mouth the Strait is about 40 miles wide, and there are a great many islands. That is the position of the water there. If I led you to believe that it opened on the open ocean without anything to obstruct the view, I was wrong in that, because it opens into a Strait 40 miles in width, the Straits of Georgia I think they are called.

The PRESIDENT.—It opens in that channel?

Mr. ROBINSON.—Yes.

Senator MORGAN.—The Straits of Fuca are different?

Mr. ROBINSON.—Yes. I think they call this the Straits of Georgia.

Senator MORGAN.—They run up on the other side of Vancouver?

Mr. ROBINSON.—Yes; the other is called Juan de Fuca.

The PRESIDENT.—The line with reference to the Arbitration of the Emperor of Germany went higher up, according to the map?

Mr. ROBINSON.—Yes, into the Straits of Georgia.

Sir JOHN THOMPSON.—The Fraser River debouches into the Straits of Georgia.

Mr. ROBINSON.—Then, some references were made yesterday by my learned friend, Sir Richard Webster, as to the point raised by Mr. Phelps, when he said that they did not intend to discuss the validity of the seizures not considering that they were in issue here. I wish to give the Tribunal two more references which seem to us to bear on that point. In the first place, in the American Argument, at page 217, we find this expression. That is the section which deals with the damages claimed by Great Britain.

> We, however, preface what we have to submit on this feature of the case by saying that, if it shall be held by this Tribunal that these seizures and interferences with British vessels were wrong and unjustifiable under the laws and principles

applicable thereto, then it would not be becoming in our nation to contest those claims, so far as they are just and within the fair amount of the damages actually sustained by British subjects.

That seems plainly to contemplate that this Tribunal is to hold one way or the other whether the seizures and interference with British vessels were wrong or justifiable or not under the laws and principles applicable thereto. If the Tribunal will turn to our Appendix Volume 3, No. 1, 1891, at page 55, they will find in that very long letter of Mr. Blaine, of I think the 17th December 1890, these words referring to a proposal made by Great Britain:

Her proposition is contained in the following paragraph, which I quote in full:

"I have to request that you will communicate a copy of this despatch, and of its inclosures, to Mr. Blaine. You will state that Her Majesty's Government have no desire whatever to refuse to the United States any jurisdiction in Behring's Sea which was conceded by Great Britain to Russia, and which properly accrues to the present possessors of Alaska in virtue of Treaties or the law of nations; and that, if the United States Government, after examination of the evidence and arguments which I have produced, still differ from them as to the legality of the recent captures in that sea, they are ready to agree that the question, with the issues that depend upon it, should be referred to impartial arbitration. You will in that case be authorized to consider, in concert with Mr. Blaine, the method of procedure to be followed."

Now that is an extract from a letter by Great Britain speaking of the hypothesis, which of course was a certainty, of the United States differing with them as to the legality of the recent captures in that sea, and the issues dependent upon it, and saying that they are ready to agree that the questions with the issues depending upon them shall be referred to an impartial arbitration. Having cited that Mr. Blaine goes on to say:

It will mean something tangible, in the President's opinion, if Great Britain will consent to arbitrate the real questions which have been under discussion between the two Governments for the last four years. I shall endeavour to state what, in the judgment of the President, those issues are.

As I understand, he refers back to issues that depend on the legality of the recent seizures; and then he states, for the first time, these 5 questions—or 6 questions as they were then, the 6th having become the 7th in the Treaty,—as he proposes them; and, as the Tribunal are aware, they were accepted with certain modifications.

I now proceed to the argument which was in progress yesterday when the Tribunal adjourned. I had said all that I desired to say with regard to the assumption or argument by the United States, that they were in the position of trustees in this particular matter, and the only element I had omitted to notice was that I remember my learned friend Mr. Carter did attach to that argument the condition that the prices should not be prohibitory. Now we know as a matter of fact that the price is prohibitory, that is to say, when you speak of being trustees for mankind at a price at which you are ready to sell the produce of this trust property, I suppose it would be a very fair average in all probability to say that there is not one in 10,000, if one in 100,000, to whom the price is not prohibitory. In truth it is an article only within reach of very rich persons; and in reality this trust obligation—which my learned friends assert is incumbent upon them, with which they assert other nations are bound not to interfere, as to which they say there can be no question whatever of the blessings which they are conferring upon mankind—is really, without exaggeration, reduced to this, that they are to sell seal skins to millionaires at a profit of 1,000 per cent. That is the precise duty asserted here, and the precise obligation incumbent upon them.

I now leave that subject, and proceed to the other two or three propositions which I find laid down by my learned friend as facts, by which they can settle the question whether this property does belong to the United States or not. The Tribunal will find that for about 20 pages, I think beginning at page 50, the attention of the Tribunal is invited to a somewhat careful enquiry into the original causes of the institution of property and the principles upon which it stands; and having discussed the origin of that institution, and the principles upon which it stands, for some 20 pages, we find it said at page 68 that.

The foregoing discussion concerning the origin, foundation, extent, form and limitations of the institution of property will, it is believed, be found to furnish, in addition to the doctrines of municipal law, decisive tests for the determination of the principal question, whether the United States have a property in the seal herds of Alaska; but it may serve the purposes of convenience to present, before proceeding to apply the conclusions thus reached, a summary of them in concise form.

I do not think it is necessary to read the first two or three propositions. The ones with which I am mainly concerned are to be found at page 69.

The extent of the dominion which, by the law of nature, is conferred upon particular nations over the things of the earth, is limited in two ways:

1. They are not made the absolute owners. Their title is coupled with a trust for the benefit of mankind. The human race is entitled to participate in the *enjoyment*.
2. As a corollary or part the last foregoing proposition, the things themselves are not given; but only the *increase* or *usufruct* thereof.

Now it is said those are the principles upon which this contest as to the property between these two nations is to be decided. In the first place I venture to say that those principles are not found in any system of law of any nation in the world, never have been part of any system of law, as we understand the term "law", never will be part, and in the nature of things never could be part of it. Is it really seriously asked that this question of property between two nations is to be decided upon principles which never formed part of the law of any nation in the world? I mean by "law" a system which declares and enforces legal rights.

I think the simplest test of that is this: Let anyone go to Congress or to the Parliament of Great Britain and ask them to embody in an Act of Parliament these provisions: first of all, that people are trustees for mankind of the property which they possess; in the next place, that they are not the absolute owners, and that the things themselves are not owned by them, but only the increase or usufruct thereof. What would be said to any such proposition? What would be said in either country would certainly be, that a man bringing forward such propositions could know very little of human nature; and yet it is said this is the law of nature, and that such propositions are to govern this case. Is that an unreasonable test or a reasonable one? Would any man be listened to as a man of ordinary practical intelligence, fit to deal with the affairs of human life, if he were to propose that either of those two propositions should be embodied in any system of law on the ground that they were following the law of nature? Would not the answer be, the man that brings forward those propositions as desiring them to form part of practical law must be utterly unacquainted with human nature?

Senator MORGAN.—Does not the law of descent and distribution all depend on the fact that it is part of the law of nature?

Mr. ROBINSON.—I should have thought very distinctly not, if you ask me; but I must first ask, though I do not ask it from any feeling of presumption—I first ask some one to tell me what nature has enacted. I have not the slightest idea of what the law of nature is, and I do

not believe anybody else knows. It is an indeterminate something; nobody can tell what it means anywhere, and it is certain that it means something different in every nation of the world.

Senator MORGAN.—Might it not be called Divine Law, in the sense that it is used in the Scriptures?

Mr. ROBINSON.—Well, I did not wish to touch on Divine Law; but as that has been referred to, I would say this: the only instance I know of where property has been taken from a man on the ground that he had not made good use of it, except on the ground that he was a lunatic, is in the parable of the ten talents. I have never heard of it since, and I do not believe that anybody has been encouraged by that instance to endeavour to embody those principles in any code of laws as a proposition of law.

Now you have asked me if the law of descent and distribution is not part of the law of nature? I ask, is it part of the French nature, or British nature, or American nature?

Senator MORGAN.—Well, it depends on the nature.

Mr. ROBINSON.—I agree, it depends on the nature; but I do not understand a law which varies according to the nature of different individuals or different nations. If so, it means nothing, and I really believe it does mean nothing. I do not believe the law of nature means anything except in some elementary particulars. You may say that the law of nature teaches affection for children and offspring, and things of that sort.

Senator MORGAN.—Well, it has been so much written about, that I supposed it to exist.

Mr. ROBINSON.—Yes; there has been a good deal written about it; and, if you refer to two references given to the Tribunal by the learned Attorney General, you will find the highest authorities known in that branch of jurisprudence say it practically means that it is an indeterminate something which people refer to without knowing what they mean, and being utterly unable to tell what the law to which they refer ordains or directs.

I venture to submit, again, that the illustration I have suggested is absolutely conclusive. If this property between nations is to be determined upon these propositions, which were asserted to be reasonable propositions, they are propositions which ought to be found in some system of law. If they are new discoveries are they propositions which by their reason would recommend themselves to any Legislature or to any country which was invited to embody them in their system of law? As a matter of fact, anybody who has a child's knowledge of human nature must know that it would be absurd to attempt to embody them in any practical system of law, or to enforce them. You can not make people trustees for mankind of their property. You may say to people, "You should not waste your property; the principal does not belong to you. You are only entitled to the interest". I am aware that many things are spoken of as rights which are simply rights in the ordinary sense of ethical rights or wrongs and moral duties. You may say that a man has no right to waste his substance and leave his family penniless. That is practically true; but in what sense? It is absolutely impossible to say that he has no legal right to do it, because he has, and no law can prevent it if the man is sane. Again, you may say that no man has a right to lose his temper, and make charges against people without just grounds. No more he has; but can you imagine any law that would attempt to prevent it? You may also say that a man is bound to be careful of what he has got, and to make the most of it; and, in a

certain sense, he has no right to do otherwise. In the case I first put it might be fairly said that it would be disgraceful and discreditable to him if he dissipated his property and left those dependent on him in want; but the world is full of such instances, and also of people who deplore them and would do anything to prevent them, and who if it were possible to make a law to reach them, would try to make that law. But no nation has attempted to do it, and no sensible man has attempted it; and yet they say it is upon such principles this question between these two great nations is to be decided by this Tribunal.

I venture to say, with great respect, it is impossible so to decide a question of this sort, and if those are said to be the decisive tests, very few minutes' argument will show that they are tests which can not decide that question, if we are right in saying that the question submitted to the Tribunal relates to rights to be decided according to law.

I will not delay the Tribunal by going into the further question of the necessity and propriety of applying to everything which is capable of ownership, or giving to everything capable of ownership, an ownership, except to say that one reason on which it is said to be founded does not seem to me to apply here. One of the main reasons is that the arts would not be practised, that the fruits of the earth would not be rendered available, unless the institution of property was awarded to encourage people to exercise their industry so as to obtain for themselves and for others those benefits. I have never heard it said that the awarding of property in animals *feræ naturæ* to the first man that can take them has discouraged the practice of hunting. On the contrary, it is that on which it rests. The only way to get these animals is by the chase; and nobody has said that animals *feræ naturæ* are not made available to human wants to the best extent they can be by the practice of hunting, which is the art, I suppose, referred to in connection with that subject.

Then they say these animals are useful, and an object of eager human desire, and that there is no substitute for them.

Is not that language very greatly exaggerated? Is there any one thing—perhaps you might include three or four others,—without which the world could do better than seal-skins? Seal-skins and diamonds, and things of that sort, are about equally useful and equally necessary. I admit that they are valuable, and I admit it is desirable to have them; but when you say that they are eager objects of human desire, they are eager objects of human desire to some of the people who can afford to pay for them, and with some few only even of those; and to speak of them as one of the things which there is any special necessity to continue to give to the world is to exaggerate, and to say what has no reasonable or proper, or sensible application to the subject we are considering.

Then, I desire to say a few words on the question of cruelty and of waste. Now, my learned friends, in many sentences,—(I have them all before me, or I have them near by)—at all events, in 8 or 10 sentences, at least, at different places, have as part of their argument, and in that part of the case which deals with the right of property and protection, not with Regulations, charged the pelagic sealers with cruelty, involving useless suffering; and with waste.

Now, first, I would ask, how far can either of those charges have any bearing whatever upon, or any relation whatever to, the question of the right of property? Their charge is that we are either injuring their industry, or destroying their property. Does it make a particle of difference whether it is done cruelly or not? I am not speaking of cruelty as I hope to do in a few minutes, or defending it. I consider simply the

legal question. Has the question of cruelty, or the fact of cruelty or the absence of it, anything to do with the right of property, or can it have?

Suppose the pelagic sealers tortured to death every seal they captured, but did not injure the United States industry, and supposing those seals were not the property of the United States, or even that they were the property of the United States, the fact that we tortured them to death would not make any difference in their rights. They could recover if they have a claim for the injury to the industry or if they own the seals. Suppose we tortured to death every seal killed but did not hurt the industry, what possible right could that give them to complain? Suppose, on the other hand, we chloroformed every seal we killed, and they did not suffer at all, but still we killed enough to injure the industry, then they would have a right to complain because we had injured it. Cruelty has no bearing upon the matter, as I submit. If so why were those charges introduced here, if not simply to endeavour to prejudice our claim, which is adverse to their own, by sensational charges which have no bearing on the legal rights or legal wrongs of the case?

In the next place, what has our waste to do with the question of legal right? My learned friends were asked very emphatically and distinctly by the learned Attorney General to define their position. Do they mean to say their right depends in any way or sense upon the mode in which we deal with these seals—economically or uneconomically—wastefully or with an absence of waste? No answer was returned to that. I do not ask the question again, because I am certain that what they would not tell the learned Attorney General they are unlikely to tell me.

Now let us see what effect it can have. Can the question of whether a thing is my property or not depend upon the use which some one else makes of it, wasteful or economical, when he gets it, or the use he is going to make of it? If it is my property I am entitled to it. If it is not my property, how can the fact that when he gets it he intends to burn it or sink it in the sea or destroy it, tend to make it my property? Again, how can the question of waste affect their right to protect their industry? If we kill 1,000 seals and it affects their industry, and they have a right to prevent our affecting their industry by the destruction of seals, how can it affect the question what we do with the seals? Their industry either prevails over ours or it does not. If it does prevail over ours, we have no right to exercise ours in any way, economically or uneconomically, to their prejudice; and if it does not prevail over ours, as we contend, we have a right to exercise ours. But how the waste, or rather uneconomical use, of the thing itself which they claim a right to protect, by us when we take it can affect the question, I have always been unable to understand, and I venture to submit every other person who considers it with a view to working out the question of property, will also be.

Then my learned friend the Attorney General calls my attention to the fact that the same argument is used by Mr. Coudert as a portion of his argument at page 713, in answer to the charge of mismanagement on the Islands that we were then making:

One single word more as to the management. The British Government have endeavoured to show that too many male seals have been killed on the Pribilof Islands beginning with the year 1870, and that a gradual deterioration in the herd has been taking place. Even if this could be shown it would form no justification for pelagic sealing, and would therefore be considered irrelevant. Suppose it were true; suppose the United States had been reckless or had employed corrupt and bad

agents, the principle is admitted to be good. The property—I will not say is conceded—but is proved to be theirs on the islands; and if pelagic sealing is destructive, the fact that we must do our sealing on the islands cannot be disputed. Suppose these seals were under the control of the United States, as well as the islands, would that make any difference, and would anybody say that we had less right to protect seals at sea because they were not treated well on the shore?

In other words, it is precisely their argument in answer to us. They say what business is it to you how we treat the seals on the islands?

That may be a sound argument on the question of Regulations, with which I have nothing to do at present. I deal simply with the legal question as to the right of property or the right to protect the industry. The truth is it has no bearing upon it. It cannot affect it in any way, and why it was introduced except for the same reason as the charges of cruelty we are at a loss to understand.

Now I pass to the charge of cruelty, which is made against us as an offence. I wish to deal with that for this simple reason. I am supposed probably to represent more particularly that portion of the Empire which is especially interested in this industry.

I do not desire to speak of the interest of Canada or British Columbia in this question at present, though it is very vital. I do not desire to do so now, for the reason that what we are discussing here is the question of legal rights. The law has to prevail; the law has to be obeyed; and it could make no difference whatever even if British Columbia lived exclusively on this industry; if she claimed to do so without legal right she must give it up and take the consequences. I agree that on the question of Regulations those considerations may have a different weight and be entitled to a different influence. Here I speak of this charge of cruelty because the charges are made against citizens of British Columbia, and my learned friends will not be offended at what I say, because they charge their own citizens in the same way with committing a crime which every civilized nation is bound by the law of nature and by their obligations to civilized society to put down and punish.

Pelagic sealers are described as *hostes humani generis*, and I think it is very difficult to express too strongly the atrocious character which they assign to what we think is a perfectly justifiable and proper industry in which we and their own citizens are concerned.

They tell us that it is abhorrent to the law of nations, and that the law of nations is founded on the law of nature. I might have said at an earlier portion of my argument, but I venture to say it now as not altogether inappropriate, that my learned friends have this formidable difficulty to contend with: that the law of nations, which is founded on the law of nature, does not interfere with but permits slavery. I should like to know how they can call upon that law to put down pelagic sealing. Is it possible that the great principles of morality upon which that law is founded, but which, nevertheless, through that law, permit slavery with all its horrors to continue—is it seriously arguable that the same principles of morality must nevertheless put down pelagic sealing? That, at all events, is the proposition which my learned friends have to contend with, which they have seen that they have to contend with, and which they answer only by saying that perhaps, if the question should come up again it might now be decided differently. It could not now be decided differently by that most eminent judge, or by any other judge acting on principles of international law, unless it could be shown that nations in the meantime had assented to make the prohibition of slavery a part of international law. The question would

not be, as he himself most clearly and explicitly said, what was his own nature and feeling, and the feeling of nearly all the nations of the civilized world—it was not what they would dictate; but the question would be, what had all the nations of the world consented to; and neither Chief Justice Marshall nor any other Judge could make international law different, because the feelings of those nations that had put down slavery if there were other nations which did not consent to make it had grown stronger against it, part of the law by which they would all be bound.

Now as to this question of cruelty, I shall not read passages again, in the United States argument, which have been read already, and which are plainly sensational and exaggerated, or any passages on our own side. There is one passage which Mr. Carter read, in which he describes the gravid females being opened, the milk and blood flowing in streams upon the deck; but let me ask, what special cruelty is there there more than any other killing. I do not defend this or say that it is right; but cruelty I understand to be the infliction of suffering; and what more cruelty is there in shooting a gravid female than a young male, as a matter of cruelty. I think it is right to make this correction with regard to cruelty, as my learned friend the Attorney General reminds me, namely, that it is the gratuitous infliction of suffering—suffering which is gratuitous, useless and unnecessary; but in that sense there is no more cruelty, and no more gratuitous infliction of suffering in shooting an animal in one condition than in any other. I will venture to say this with regard to cruelty: Of all the witnesses we have cited, Mr. Palmer at all events has stood so far unquestioned, and Mr. Palmer is a gentleman of science sent by an institution which stands, if not at the head, almost at the head of science on the continent of America. He was sent by the Smithsonian Institute to examine the state of affairs in those islands.

General FOSTER.—We most seriously question that.

Mr. ROBINSON.—I do not speak of your seriously questioning. The accuracy, of course, they question—they question the accuracy of every charge made; but I speak of their questioning the veracity and high character of Mr. Palmer: nothing else. I do not think there is much object in their questioning a thing unless they can disprove or impeach the veracity of the witness.

Now Mr. Palmer's letter, at all events, is to be found in the report of the British Commissioners at page 189, and you will see what is said by him. This is a paper read before the Biological Society of Washington.

General FOSTER.—A part of a paper.

Mr. ROBINSON.—Yes, said to be an extract of a paper. The other portion of it, I may say, is given by the United States in their Counter Case.

General FOSTER.—The whole article in full is given.

Mr. ROBINSON.—No, I think not. I think what you have given is what we did not give, but I may be wrong about that. However, that is my recollection. I think they gave what we did not give, but we have the whole paper between the two, so that it is of no importance whether I am right or General Foster is right. I am quite content to assume that I am wrong in a matter of this kind.

Now I will not weary or pain the Tribunal by reading that letter again, which has been partially read already. I repeat, whatever may be said about Mr. Elliot, or whatever may be said about others, I am not aware that there is a shadow of ground for doubting Mr. Palmer's

entire veracity. He speaks of what he had seen, and testifies to what he knew by personal observation; and it is not too much to say, and I speak to those who can verify my assertion by their own reading, that a more pitiable, painful story of utter useless, barbarous cruelty inflicted upon dumb animals cannot be imagined. I do not think that these words are in any way or sense exaggerated. I am speaking now of the method of driving the seals which Mr. Palmer observed on the Islands and its effect, and the words which I have used I attribute to that system. I am not reproaching the United States in any way. As Mr. Palmer says, they have to manage dumb animals through the medium of half-civilized men, and until they get a different class of supervisors, it will be utterly impossible to do very much to moderate that—I believe it will be found wholly impossible;—but Mr. Palmer describes what I have said, and to put it shortly, it is this. "Countless thousands", to use his own words, of those dumb animals have been done to death—to a death of long, lingering agony—simply by mismanagement; and their bodies have been wasted. Anybody may test what I say, and form for himself his own judgment by more than reading, because he may do it by personal observation. Let any one go to either of the Gardens here, where the seals are to be found, and watch one of those animals proceeding at its leisure, without being urged, along the smooth gravel path; and then let him try to imagine what the sufferings of these poor brutes must be when driven from one mile to three over sharp stones by boys or savages or half-civilized men. Now that is what is done there. I say nothing about the United States. I make it no subject of reproach; I merely say they are not in a position to reproach us. I venture to say this—If this case depended on the question, by whom has the greatest amount of gratuitous and unnecessary suffering been inflicted upon the seal race, and by whom has the larger number of that race been utterly wasted—by the system pursued upon the Islands or by pelagic sealers; if this case depended on that question, and if the seals could speak of what they knew and had felt, I should be perfectly content to leave the case to their decision. There is no question, if Mr. Palmer tells the truth, as to what the result has been. The system has to be altered there, and it may be altered as far as it is in their power to do it; but it is very difficult in an out-of-the-way part of the world, and with the class of men they have to deal with, to secure the right class of men.

Now Mr. Carter at page 204 of their argument, answers a remark of the British Commissioners, in which they say that, in anything said in favour of pelagic sealing, it must be remembered that it is an industry followed by the United States citizens and open to the United States citizens as well as to us, and they are not speaking in the interests of one nation only when they speak of it as being rightful, or discuss by what means or by what regulations it can be reasonably or properly pursued. The answer which is made is that the United States—

> Deems itself bound by the spirit and principles of the law of nature, holds itself under an obligation to use the natural advantages which have fallen to its lot, by cultivating this useful race of animals to the end that it may furnish its entire increase to those for whom nature intended it, wherever they dwell, and without danger to the stock. It holds, as the law of nature holds, that the destruction of the species by barbarous and indiscriminate slaughter is a *crime*, and punishes it with severe penalties. Its enactments, adopted when it was supposed that the only danger of illegitimate slaughter was confined to Behring Sea, were supposed to be adequate to prevent all such slaughter. Are the United States to be deprived of the benefit of the seals unless they choose to abandon and repudiate the plain obligations of morality and natural law?

Now, if they thought that there was no illegitimate slaughter outside Behring Sea, the United States have learned long ago, or some years ago at all events, that this was a mistake,—and how it is possible many people could have thought so, it is difficult to see if they knew anything of the habits of the seals then. If they believed that it was their duty to other Nations and to the civilised World to put down and punish the perpetrators of this crime, why did not they put it down and punish it outside Behring Sea? I understand why; because this kind of language and argument was not in their minds. Their Legislation was intended, as the Legislation of all nations has been intended, not in the interest of the feelings of animals *feræ naturæ*, but in their own material interest and for their own benefit. Let me see what answer is given by my learned friend, Mr. Carter, when in the course of his argument. It was pointed out that they had the power, because they can prevent their nationals committing this crime against nature any where, and—if they are *hostes humani generis* all over the world, why do you say they must not be so in a portion of the world only, namely inside Behring Sea?

The answer was,

> Of course, it might be said by Congressmen, if all the world is to be permitted to go up there and take the seals, we might as well let our own nationals go. We will not protect the seals against attacks by our own citizens if other people are to be allowed to attack them.—

In other words, and the President has put that very strongly in reference to the suggestion made by us, if they were correct in their argument, they should have prevented it everywhere,—I ask are those positions consistent? Is my learned friend really saying that one of the Members of their Congress might say.

> This is barbarous and inhuman, and an act which every civilised nation is bound to put down; but if other nations are going to carry it on, then we will let our own people carry it on with them?

What my learned friend says is, it might be said by Congressmen; or, in other words, it might be said by the Members of a Parliament of a civilised Nation, that.

> Other Nations are guilty of this barbarity; why should not our nationals share in it, till other Nations choose to put down such enormities?

I am really treating this matter in a reasonable spirit, I venture to submit, and in the spirit in which only it can be approached with any reason.

I am saying nothing invidious here, because I have no charge to make against the people of the United States which I believe does not lie against every other nation of the world. But it is true, and we might as well look that in the face, that neither law nor legislation of civilised nations up to this time have ever been prompted or influenced by the feelings of animals *feræ naturæ*, to any extent whatever; they have been dealt with as best suited what were supposed to be the material interests of the Nations.

Take the case of the Buffalo, which we all know. I have extracts here from Mr. Allen, a man vouched for by the United States as a man of high character and attainments; who has published a monogram on the Buffalo, warning the United States that they were being destroyed, and calling upon them to save them. Those animals, both in the United States and Canada,—this affects both Nations,—were slaughtered recklessly and ruthlessly, without regard to time, or place, to sex or age. They were slaughtered by thousands, and left lying on the Prairies,

for the sake of their skins. As a matter of fact, their skins were much more useful than seal-skins. I venture to say, and those gentlemen who know that part of the world will say if I am right or not, that for one person to whom seal-skins have brought comfort and warmth, in all probability buffalo skins brought it to ten. They were articles sold for a moderate price, and I recollect myself when you could get them for 4 or 5 dollars, and were universally used by people of moderate means. But the Buffalo race had no influential Corporation interested in their existence, and yielded no revenue to the Government and nobody took the slightest interest in them. They were slaughtered by white men called "skin-hunters" and Indians; and, if we may resort to the law of nature, I do not know how we are to get nearer to it than to see the method in which those Tribes, who have been called by some of the greatest novel-writers "the untutored children of nature", were prompted by the laws of their nature to deal with dumb animals.

Uncivilized men were acting under the law of nature; civilized men never interfered to prevent it. Other instances can be found, in the feathered tribe for instance. I am sure one or two members of the Tribunal to whom I am speaking remember the Passenger Pigeon.

Senator MORGAN.—With reference to the Buffalo. In order to civilise these Indians and get them into agricultural pursuits we were obliged to permit their support of wild game to perish.

Mr. ROBINSON.—I accept the suggestion. I am very glad you have mentioned it, Sir, for this reason. That matter is alluded to in either the argument or Counter Case of the United States, and it is said that it was necessary to exterminate the buffalo in order to make way for the Ranchmen, and for a better and superior race of domestic cattle.

Senator MORGAN.—That is true also.

Mr. ROBINSON.—That is true to a certain extent. I am perfectly willing to admit that eventually the buffalo would have had to give way; but there are at this moment thousands—nay, tens of thousands of square miles where the Buffaloes have been exterminated, but where civilization has never come, and where, for the best part of another generation, both in Canada and I believe the United States, it may not come, but the buffalo has been exterminated because it had no friends—that is the whole story. The Ranchmen did not like them; the Settlers did not like them; and nobody cared either for humanity, or civilization; or for the interests of the buffalo.

Senator MORGAN.—Very much like the rabbits in Australia and in England, they may be considered to be noxious animals.

Mr. ROBINSON.—With great deference, I do not think the buffaloes could be considered like the rabbits in Australia. I venture to say that you yourself Sir, on reflection, will hardly consider it a fair analogy. But we all know—those who have journeyed over the prairies—that we have found the bones by hundreds of these animals which have been slaughtered. I have been told by one person that he has seen 2,000 killed in what is called a single run in a small portion of the day. The bodies were left on the prairies, and nothing taken but the skins. At all events neither civilization, humanity nor anything else interfered to prevent it.

I was going to refer to the Passenger Pigeon as another instance in reference to birds. They are birds, whose habits in one respect, are strongly analogous to the habits of the seals. The Passenger Pigeons, within my recollection, were in absolute myriads in the United States and the Northern States of Canada. Their habit was in the breeding season to take up their abode in an enormous tract of wood. I have

seen two such "Pigeon Roosts"—one some miles long, and about a mile broad—in which there would be found from two to twenty nests, on every tree, and the birds were there in absolute millions. The people round about shot the birds in their nests, and they destroyed the young, and tried in every possible way to slaughter them, and thus a most useful food bird to man was exterminated. Nobody interfered to prevent it. The Walrus was destroyed in the same way and exterminated, or nearly so, and the sea otter; and when my friends say that cannot be prevented, they have Statutes on their Statute Books, which, according to our evidence, have not been enforced. And we show there is a possibility of practising husbandry with the Sea Otter: that the Russians have tried to keep preserves, but the Sea Otters are gradually becoming extinct.

As to the seals themselves, I would ask the Tribunal to be good enough to refer to the British Commissioners' Report, page 89, sections 511 to 514. You will find, Sir, that as late as 1881 these seals were treated thus—10,000 of them were actually destroyed simply to prevent the Japanese from getting any of them. Perhaps I may as well read just a few sentences to show how it came about.

Section 511 of the British Commissioners' Report is as follows:

In 1871, this island——

that is Robben Island——

with the Commander Islands, was leased to Messrs. Hutchinson, Kohl, Phillipeus, and Co., who transferred their rights to the Alaska Commercial Company. Mr. Kluge went there in the same year in the interests of the lessees, and found that, in consequence of the raid in 1870, there were not over 2,000 seals to be found on the entire island. The island was watched in that year, but no seals were killed. A few may have been killed in 1872, though, if so, the number is not known; but from 1873 to 1878 rather more than 2,000 skins were on the average taken annually by the Company from this one small reef.

512. About the year 1879, schooners sailing from Japan began to frequent the island, and were in the habit of raiding it in the autumn, after the guardians had been withdrawn. In 1881, the Company's agent remained on the island as late as the 5th November, at which date five or six Japanese schooners were still hovering about, looking for a chance to land. The Dutch sealer "Otsego" was warned off by the Company's trading steamer "Alexander." In consequence of such raids, the number of seals declined from year to year.

513. Probably discouraged by the cost and difficulty of protecting the island, and in order to prevent competition in the sale of skins, the Company in 1883 made a barbarous attempt to extirpate the seals on it. A full account of this attempt is given in the deposition of C. A. Lundberg, who arrived at Robben Island in the schooner "North Star" from Yokohama, and found the mate of the schooner "Leon," a vessel in the employ of the Alaska Commercial Company, living on the island with about fifteen Aleuts. Lundberg found a great mass of dead and decaying seals upon the shore, which had been killed by these men, as they said, in order to "keep any of those Yokohama fellows from getting anything this year." The crews of the "North Star" and another schooner, the "Helene," then set to work to remove the carcasses, which included those of many females and young, and proved to number between 9,000 and 10,000. In the process, they managed to pick out some 300 skins in good condition. There were thousands of seals in the water, but they would not pull out on the beach on account of the stench and filth.

Senator MORGAN.—What was that Company?

Mr. ROBINSON.—The same Company as I understand.

Senator MORGAN.—Holding a lease under Russia, was it?

Sir CHARLES RUSSELL.—They were holding a lease of Robben Island under Russia.

Mr. ROBINSON.—This the Tribunal will find verified by the affidavits of Captain Folger, and Captain Miner, which are to be found at pages 89 and 113.

Senator MORGAN.—Let me ask, was this massacre of the seals ever called to the attention of the Russian Government.

Mr. ROBINSON.—I cannot say—I do not know whether it was or was not; but it was a vessel in the employment of the Company.

Then the British Commissioners say this in paragraph 514:

We were also informed that Captain Hansen, afterwards master of the German schooner "Adele," was present on this occasion. Captain Miner, an experienced sealing-master of Seattle, also visited the island in the same year, and described to us the great heap of carcasses which he found on the island, and the manner in which the skins had been slashed in order to render them useless.

In other words, lest they should get into the hands of rival traders—into the hands of the Japanese—10,000 animals were slaughtered and their skins were destroyed.

I have also another extract here which carries out what I say as to the difficulty of securing anything like humanity to these poor beasts when in charge of such people as it is necessary to employ. In the Report upon the Fur-Seal Fisheries of Alaska (which has been referred to several times in the case here on other points), I find this sentence at page 32. It is evidence taken before Congress on the Fur-Seal Fisheries:

Q. Did the Company, in its administration of affairs there, seem to take care for the preservation of seal life as well as care over the natives?—A. Yes, Sir. We could not get the natives to try to preserve the seal life. Boys of twelve and fourteen years old would kill the seal pups. They say they are mild sort of people, but they never have a chance to abuse a dumb creature but what they do it. The only time I had any person incarcerated was a boy about eighteen years old. I took him and put him in the cellar of the store and kept him there two days for killing pup seals.

And so on. That is a small illustration of the difficulty which is found in securing humane treatment with the appliances at hand.

The place is far off; the climate is inhospitable; the drives take place at two o'clock in the morning in charge of people of this description, who, as Mr. Palmer has said, much prefer their beds to a cold wet foggy place at that time of the morning, and the Seals are hurried on with the result which is described.

Senator MORGAN.—What is the object of driving them so early in the morning.

Mr. ROBINSON.—Because they are killed at 7.

Senator MORGAN.—Why not at 12, or 1 o'clock?

Mr. ROBINSON.—Because of the heat, I fancy—I should think so; I cannot say I know.

Now my friend Mr. Coudert has talked about tampering with the law of nature, and he has told us that the law of nature can never be tampered with impunity; that the punishment is inexorable. I venture to say the greatest defiance of the law of nature we have heard of is to drive poor beasts not intended for progress on land for two or three miles over ground of the description which is given there—over stones so sharp and so pointed that even the natives themselves avoid them and take another path. That *is* tampering with the law of nature, and tampering with the law of nature in the very worst possible manner. It cannot be done with impunity, but the difficulty is that the punishment does not come to those who practice it, but to the animals themselves, and thousands of the race have been wasted simply by the methods adopted there.

Now pelagic sealing may have its objections—I think it has. There is some cruelty about the pursuit of all dumb animals. I only call attention to this because it is right to say that these charges are unjust and unreasonable when you charge pelagic sealers, many of whom are most respectable men—many of whom are supporting their

families by what I believe to be and what I have no hesitation in saying is a respectable employment—when you charge these men with all the crimes of the Decalogue, we have the right to turn to the conduct of those by whom the charge is made, and ask if it lies in their mouth to make it. I venture to say it does not.

I do not think, Mr. President, that there are any other topics which, in the view I have taken of this case—(the only view, as I said in the beginning, in which it seemed to me I could be of any possible use to the Tribunal)—it seems necessary for me to make. Recurring again to what I ventured to say with regard to International Arbitrations at the opening of my argument, I may add that when nations submit to a Tribunal of this character their rights, they mean their rights to be determined by law, and they mean a definite certain law which can be found by anyone laid down somewhere—a law, which may afford a sensible guide in the conduct of human affairs—not theories, not speculations, not the opinions of metaphysicians as to what the law ought to be, and as to what it would be well to make it, or what the law would be if human nature were changed; but their rights are to be determined by the law as we find it, which I take it is always, and on all occasions, the embodiment of what nations believe to be right and desirable, and what in practice can be enforced. We believe this claim, judged by these common sense principles, fails altogether, and we submit there is no reasonable ground—no legal ground—upon which the United States can claim either a property in these animals or an industry which they have a right to protect.

I do not desire to add any remarks upon the question of the right of protection, and merely for this reason: in the first place it has been very thoroughly discussed, and in the next place I entirely agree, if I may venture to say so, with what my learned friend the Attorney General has said. If it is their property, we have to respect it; and it is very little use (except as regards the past, and the seizures) to discuss it further. If they have a right of protection, or if they own the seals, their property and their right will have to be respected.

As regards the right to condemn and to seize vessels, I do not profess to be very familiar with the subject, but I should have thought it was absolutely clear that condemnation and seizure were things which can be enforced only by some positive maritime law. If a vessel of any nation, for instance, were to come to a port of England and steal some government property, it is inconceivable that there would be any right to follow that vessel, seize her, bring her in, and condemn her—condemn a vessel of the value of £10,000 because she had stolen £10 worth of property! You could only do that under some international law which gives the right according to the law of nations; and this can never be except in the case of piracy, or under some municipal law—some valid law—within the territory of the nation in fact, and which therefore can be enforced.

That, Mr. President, is all I think I can add with any hope of being of the least use; and I can only thank the Tribunal for the patience with which they have listened to what I am perfectly well aware must have been, to a large extent, repetition.

The PRESIDENT.—Mr. Robinson, we think you have made very good use of what you were pleased to call (with I think excessive modesty) the scraps and leavings of your leaders; indeed you have made very good work from those, and we are thankful for it.

Sir RICHARD WEBSTER.—If General Foster will forgive me for a moment I want to refer to the statutes. Mr. Carter was good enough,

Mr. President, to give us the reference. The point will probably become unimportant from the point of view of my friend Mr. Phelps, but inasmuch as reference to it was made, it is important that the Tribunal should know, and have on the record, the whole facts with regard to it.

The District Court, as Mr. Carter told us—was established by the Act of 1884. And the reference to that will be found, as Mr. Carter said, on page 431 of the First volume of the Revised Statutes of the United States.

Section 3 of Chapter 53 (1884) 48th Congress, is as follows.—

That there shall be, and hereby is, established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not in consistent with this act, as may be established law.

Then Mr. Carter read one Section only, (saying there were others), from the definition of the jurisdiction of the District Courts. I desire that the others should be read, because as was surmised by several members of the Tribunal, the Court has a variety of jurisdictions, and from this section read it will be seen that there is not any foundation for the suggestion that the Court, was acting as a Prize Court.

The section is 563 of the Revised Statutes giving jurisdiction to the District Courts, and these are the jurisdictions:

The following is the text of section 563, of chapter 3, title XIII:

THE JUDICIARY.

The district courts shall have jurisdiction as follows.

First. Of all crimes and offences cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section fifty-four hundred and twelve, Title "CRIMES".

Second. Of all cases arising under any act for the punishment of piracy, when no circuit court is held in the district of such court.

Third. Of all suits for penalties and forfeitures incurred under any law of the United States.

Fourth. Of all suits at common law brought by the United States, or by any officer thereof authorized by law to sue.

Fifth. Of all suits in equity to enforce the lien of the United States upon any real estate for any internal-revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title, or interest.

Sixth. Of all suits for the recovery of any forfeiture or damages under section thirty-four hundred and ninety, Title "DEBTS DUE BY OR TO THE UNITED STATES"; and such suits may be tried and determined by any district court within whose jurisdictional limits the defendant may be found.

Seventh. Of all causes of action arising under the postal laws of the United States.

Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. [And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine.]

Ninth. Of all proceedings for the condemnation of property taken as prize, in pursuance of section fifty-three hundred and [*seventy-six,*] [eight,] Title "INSURRECTION".

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Eleventh. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States by any act

done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty five, Title, "CIVIL RIGHTS".

Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity secured by the constitution of the United States, or of any rights secured by the law of the United States to persons within the jurisdiction thereof.

Thirteenth. Of all suits to recover possession of any office, except that of elector of President, or Vice-President, Representative or Delegate in Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided*, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

Fourteenth. Of all proceedings by the writ of *quo warranto*, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress, or of a State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States.

Fifteenth. Of all suits by or against any association established under any law providing for national banking associations within the district for which the court is held.

Sixteenth. Of all suits brought by any alien for a tort "only" in violation of the law of nations, or of a treaty of the United States.

Seventeenth. Of all suits against consuls or vice-consuls, except for offences above the description afore said.

Eighteenth. The district courts are constituted courts of bankruptcy, and shall have in their respective districts original jurisdiction in all matters and procedings in bankruptcy.

Therefore I point out that the Court has a variety of jurisdictions, and particularly the one under which these proceedings were taken, namely for penalties and forfeitures incurred under any law of the United States.

Then, Mr. President, by Sections 3059, 3067, 3084, and 3088, proceedings can be taken for a violation of those laws set out in the United States appendix by a Custom House or Revenue Officer who is entitled to institute, under this Statute, to take the very proceedings which were instituted in the Court of Alaska for penalties for breaches of those Statutes. Of course I am not going to repeat my argument—I only desire that the Tribunal should be in full possession of the fact that the Court had jurisdiction to act and did act under these Sections to which I have referred; and I think the idea that it was acting as a Prize Court will not be found to be well founded. I am aware that my friends do not contend for it, but I thought it right to mention it.

Section 3059, of chapter 10 Title XXXIV, collection of Duties, is as follows:

It shall be lawful for any officer of the customs, including inspectors and occasional inspectors, or of a revenue-cutter, or authorised agent of the Treasury Department, or other persons specially appointed for the purpose in writing by a collector, naval officer, or surveyor, to go on board of any vessel, as well without as within his district, and to inspect, search, and examine the same, and any person, trunk, or envelope, on board, and to this end to hail and stop such vessel if under way, and to use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby, or in consequence of which such vessel, or the merchandize, or any part thereof, on board of or imported by such vessel, is liable to forfeiture, to make seizure of the same, or either or any part thereof, and to arrest, or in case of escape, or any attempt to escape, to pursue and arrest any person engaged in such breach or violation.

Section 3067: It shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue-cutters, to go on board of vessels in any port of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purposes of demanding the manifests, and of examining and searching the vessels; and those officers respectively shall have full access to the cabin, and every other part of a vessel.

Section 3083: Whenever any seizure shall be made for the purpose of enforcing any forfeiture, the collector, or other person causing such seizure to be made, shall immediately give information thereof to the solicitor of the Treasury.

Section 3084: The several collectors of customs shall report within ten days to the district attorney of the district in which any fine, penalty, or forfeiture may be incurred for the violation of any law of the United States relating to the revenue, a statement of all the facts and circumstances of the case within their knowledge, or which may come to their knowledge from time to time, stating the names of the witnesses and the provisions of the law believed to be violated, and on which a reliance may be had for condemnation or conviction. If any collector shall in any case fail to report to the proper district attorney, as prescribed in this section, such collector's right to any compensation, benefit, or allowance in such case shall be forfeited to the United States and the same may, in the discretion of the Secretary of the Treasury, be awarded to such persons as may make complaint and prosecute the same to judgment or conviction.

Section 3088: Whenever a vessel, or the owner or master of a vessel, has become subject to a penalty for a violation of the revenue laws of the United States, such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily by libel to recover such penalty.

The only other matter I ought to mention is with reference to an enquiry made by Mr. Justice Harlan as to the third projet for the Treaty mentioned at page 74 of the second volume of the Appendix to the British Case; and I think I cannot do better (inasmuch as Mr. Foster indicated the other day for the first time that he desired particularly to have the paper) than tell the Tribunal, so that it may be put on record, exactly what happened. I will read from an Official Document from the Foreign Office. You, Mr. President, will remember that Mr. Justice Harlan asked me whether we could produce it. In the letter of the 8th December 1824, four documents are referred to. First: the projet which Sir Charles Bagot was authorized to sign and conclude, 2nd, the "contre-projet" drawn up by the Russian Plenipotentiaries, 3rd, a despatch from Count Nesselrode accompanying the transmission of the "contre-projet" to Count Lieven. That I have not got.

Mr. Justice HARLAN.—That is in the papers.

Sir RICHARD WEBSTER.—No, that document is not in the papers.

The PRESIDENT.—There is a second Russian projet.

Sir RICHARD WEBSTER.—The projet as it stands, according to the observations of the despatch, is enclosed. That is referred to at the bottom of page 74, and I will say in passing that the document cannot be of any substantial importance because we have got all the alterations which were to be embodied in it, suggested in this very letter of the 8th December 1824, and therefore we have got the substance.

But this is how the matter stands.

Although the original of Mr. G. Canning's despatch to Mr. S. Canning, nº 1 of December 8th 1824, which appears on pp. 72–75 of Volume II of the Appendix to the British Case, was found in the archives of the Foreign Office, no trace could be discovered of the documents referred to as being enclosed therein, among which was the "Project" of the new Treaty with Russia. Two of these inclosures namely, the "Project" of Treaty sent to Sir C. Bagot in 1824—that is nº 1, p. 72—and the "Contre-projet" by the Russian Plenipotentiaries in the same year were forthcoming as inclosures in other Despatches, and are given at pp. 62 and 68 respectively of vol. II of the Appendix to the British Case.

The PRESIDENT.—You read part of those I believe?

Sir RICHARD WEBSTER.—Yes. I read them all or nearly all. The document, as I might remind the Tribunal, about which Mr. Justice Harlan asked me, was the third draft embodying the suggestions of this letter.

But the two remaining inclosures namely, the Despatch from Count Nesselrode accompanying the transmission of the "Contre-projet" to Count Lieven, and the "Projet" of the new Treaty could not be found. It was considered of great importance that these documents should, if possible, be obtained in order to make the

correspondence complete, and, all efforts to trace them in the archives of the Foreign Office having failed, a telegram was sent by Lord Salisbury to Mr. Howard, the British chargé d'affaires at St-Petersburgh dated June 20th 1892, No. 23 [that was when we were preparing the case] of which the following extract is the only portion bearing on the point in question.—"We should be glad to have copy of the Despatch from Count Nesselrode to Count Lieven inclosed in Mr. Canning's despatch to Mr. S. Canning, nº 1 of December 8th 1824, and of the new draft of Convention also enclosed in that despatch". Mr. Howard replied by a telegram dated St. Petersburgh June 22nd, 1892, nº 40, of which the following is the only material extract.—"None of Mr. Canning's despatches to Mr. S. Canning can be found in archives". All efforts therefore failed, both at London and St-Petersburgh, to trace the missing documents.

I am quite satisfied that the explanation will be satisfactory to the Tribunal. I may merely mention from my own knowledge that I know of the efforts made to find the document; but I also discovered from perusing these documents most carefully when the Case was framed, that this document that we should have liked to have had could not affect the question, because it was stated, in the letter, to be a document which simply embodied the alterations in the projet as they would stand according to the observation of the despatch.

The PRESIDENT.—The fourth document is the English draft.

Sir RICHARD WEBSTER.—That is the one I am referring to.

The PRESIDENT.—Mr. Justice Harlan asked for the Russian.

Sir RICHARD WEBSTER.—No, Mr. Justice Harlan asked for this particular document Mr. President—the English draft which Mr. George Canning sent to Mr. Stratford Canning, as it would stand according to the observation of this despatch.

The PRESIDENT.—The substance of it is in the despatch itself.

Sir RICHARD WEBSTER.—Yes.

Mr. Justice HARLAN.—Mr. Stratford Canning in his letter to Mr. George Canning, stating the signing of the Treaty, indicates that there was some alteration although he says it is in strict conformity with the spirit and substance of the contre-projet to Count Lieven, although there was a slight alteration which might have been made.

Sir RICHARD WEBSTER.—It is Perfectly true that Mr. Stratford Canning on referring to the Treaty speaks of the Treaty as being in accordance with that of this draft although there was a slight alteration in some particular passage.

Mr. FOSTER.—I have here a paper which I propose to lay before the Tribunal:

The Government of the United States, in the event that the determination of the High Tribunal of certain questions described in the seventh article of the Treaty as the foregoing questions as to the exclusive jurisdiction of the United States should, as, mentioned in said seventh article, "leave the subject in such a condition that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, Behring Sea", submits that the following Regulations are necessary and that the same should extend over the waters hereinafter in that behalf mentioned:

First. No citizen or subject of the United States or Great Britain shall in any manner kill, capture or pursue anywhere upon the seas within the limits and boundaries next hereinafter prescribed for the operation of this regulation, any of the animals commonly called fur-seals.

Second. The foregoing regulation shall apply to and extend over all those waters, outside the jurisdictional limits of the above-mentioned nations, of the North Pacific Ocean or Behring Sea which are north of the thirty-fifth parallel of North latitude, and east of the one-hundred and eightieth meridian of longitude West from Greenwich. Provided, however, that it shall not apply to such pursuit and capture of said seals as may be carried on by Indians dwelling on the coasts of the territory either of Great Britain or the United States for their own personal use with spears in open canoes or boats not transported by or used in connection with, other vessels, and propelled wholly by paddles, and manned by not more than two men each, in the way anciently practiced by such Indians.

Third. Any ship, vessel, boat or other craft (other than the canoes or boats mentioned and described in the last foregoing paragraph) belonging to the citizens or subjects of either of the nations aforesaid which may be found actually engaged in the killing, pursuit or capture of said seals, or prosecuting a voyage for that purpose, within the waters above bounded and described, may, with her tackle, apparel, furniture, provisions and any sealskins on board, be captured and made prize of by any public armed vessel of either of the nations aforesaid; and in case of any such capture may be taken into any port of the nation to which the capturing vessel belongs and be condemned by proceedings in any court of competent jurisdiction, which proceedings shall be conducted so far as may be, in accordance with the course and practice of courts of admiralty when sitting as prize courts.

June 8th, 1893.

I hand this to the Secretary, and furnish the gentlemen on the other side with a copy.

The PRESIDENT.—Those are the regulations you propose?

Mr. FOSTER.—That is the form of regulations proposed by the United States.

The PRESIDENT.—That is to be taken as an addition to the conclusions the American counsel had come to before?

Mr. CARTER.—It is putting them in form.

Mr. FOSTER.—I now desire to submit the substitute proposed by the Government of the United States for the findings of fact submitted by the Government of Great Britain.

Sir CHARLES RUSSELL.—It is a great pity you did not discuss both these questions with us. We had no notice of this at all.

Mr. PHELPS.—We will not discuss them now. These are only presented for your information.

Mr. FOSTER.—We are pursuing the same course as that adopted by counsel for the British Government in this matter.

Sir CHARLES RUSSELL.—Oh no.

Mr. PHELPS.—Mr. President...

Sir CHARLES RUSSELL.—I am not interposing, Mr. Phelps, except to say that it would have been more convenient to talk about these things outside.

The PRESIDENT.—Has the British counsel any objection to the Court receiving these documents?

Sir CHARLES RUSSELL.—No, Sir.

Mr. FOSTER.—(Reading).

"Substitute proposed by the Government of the United States for findings of facts submitted by the Government of Great Britain:"

Sir RICHARD WEBSTER.—Is this a copy of our document?

Mr. FOSTER.—We propose it as a substitute for yours.

Sir RICHARD WEBSTER.—These are the substituted ones; are they?

Mr. CARTER.—So far as they differ.

Mr. FOSTER.—They are as follows:

1. That the several searches and seizures, whether of ships or goods, and the several arrests of masters and crews, respectively mentioned in the said Schedule, were made by the authority of the United States Government. Which and how many of the vessels mentioned in said schedule were in whole or in part the actual property of British subjects, and which and how many were in whole or in part the actual property of American subjects, is a fact not passed upon by this Tribunal. Nor is the value of said vessels or contents, or of either of them, determined.

2. That the seizures aforesaid were made upon the sea more than ten miles from any shore.

3. That the said several searches and seizures of vessels were made by public armed vessels of the United States, the commanders of which had, at the several times when they were made, from the Executive Department of the Government of the United States instructions, a copy of one of which is annexed hereto, marked "A," and that the others were, in all substantial respects, the same; that in all the instances in which proceedings were had in the District Courts of the United States

resulting in condemnation, such proceedings were begun by the filing of libels, a copy of one of which is annexed hereto, marked "B" and that the libels in the other proceedings were in all substantial respects the same; that the alleged acts or offences for which said several searches and seizures were made were in each case done or committed upon the seas more than ten miles from any shore; and that in each case in which sentence of condemnation was had, except in those cases when the vessel was released after condemnation, the capture was adopted by the Government of the United States. That the said fines and imprisonments were for alleged breaches of the municipal laws of the United States, which alleged breaches were wholly committed upon the seas more than ten miles from any shore.

4. That the several orders mentioned in said Schedule warning vessels to leave Behring Sea were made by public armed vessels of the United States, the commanders of which had, at the several times when they were given, like instructions as mentioned in finding 3, above proposed, and that the vessels so warned were engaged in sealing or prosecuting voyages for that purpose.

5. That the said several searches, seizures, condemnations, confiscations, fines, imprisonments and orders were not made, imposed or given under any claim or assertion of right or jurisdiction except such as is submitted to the decision of the Arbitrators in Article VI of the Treaty of Arbitration.

6. That the District Courts of the United States in which any proceedings were had or taken for the purpose of condemning any vessel as mentioned in the Schedule to the Case of Great Britain, pages 1 to 60, inclusive, had all the jurisdiction and powers of Courts of Admiralty, including the prize jurisdiction.

ANNEX "A."

[See British Counter Case, Appendix, Vol. I, p. 72.]

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
Washington, April 21, 1886.

SIR: Referring to Department letter of this date, directing you to proceed with the revenue-steamer "Bear," under your command, to the Seal Islands, etc., you are hereby clothed with full power to enforce the law contained in the provision of Section 1956 of the United States Revised Statutes, and directed to seize all vessels and arrest and deliver to the proper authorities any or all persons whom you may detect violating the law referred to, after due notice shall have been given.

You will also seize any liquors or fire-arms attempted to be introduced into the country without proper permit, and the provisions of Section 1955 of the Revised Statutes, and the Proclamation of the President dated 4th February, 1870.

Respectfully yours,

C. S. FAIRCHILD, *Acting Secretary.*

Captain M. A. HEALY,
Commanding Revenue-steamer "Bear," San Francisco, California.

ANNEX "B."

[See British Case, Appendix, Vol. III, U. S. N°. 2, 1890, p. 65.]

In the District Court of the United States, for the District of Alaska.—August Special Term, 1886.

To the Honourable LAFAYETTE DAWSON,
Judge of said District Court:

The libel of information of M. D. Ball, Attorney for the United States for the District of Alaska, who prosecutes on behalf of said United States, and being present here in court in his proper person, in the name and on behalf of the said United States, against the schooner "Thornton," her tackle, apparel, boats, cargo, and furniture, and against all persons intervening for their interest therein, in a cause of forfeiture, alleges and informs as sollows;——

That Charles A. Abbey, an officer in the Revenue Marine Service of the United States, and on special duty in the waters of the district of Alaska, herefore, to wit, on the 2st day of August, 1886, within the limits of Alaska territory, and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring Sea belonging to the said district, on waters navigable from the sea by vessels of 10 or more tons burden, seized the ship or vessel, commonly called a schooner, "Thornton," her tackle, apparel, boats, cargo, and furniture, being the property of some person or persons to the said Attorney unknown, as forfeited to the United States, for the followieg causes:——

furniture, being the property of some person or persons to the said Attorney unknown, as forfeited to the United States, for the following causes:——

That the said vessel or schooner was found engaged in killing fur-seal within the limits of Alaska Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States.

And the said Attorney saith that all and singular the premises are and were true, and within the Admiralty and maritime jurisdiction of this court, and that by reason thereof, and by force of the Statutes of the United States in such cases made and provided, the afore-mentioned and described schooner or vessel, being a vessel of over 20 tons burden, her tackle, apparel, boats, cargo, and furniture, became and are forfeited to the use of the said United States, and that said schooner is now within the district aforesaid.

Wherefore the said Attorney prays that the usual process and monition of this honourable Court issue in this behalf, and that all persons interested in the before-mentioned and described schooner or vessel may be cited in general and special to answer the premises, and all due proceedings being had, that the said schooner or vessel, her tackle, apparel, boats, cargo, and furniture may, for the cause aforesaid, and others appearing, be condemned by the definite sentence and decree of this honourable Court, as forfeited to the use of the said United States, according to the form of the Statute of the said United States in such cases made and provided.

M. B. BALL,
United States District Attorney for the District of Alaska.

The PRESIDENT.—Those are the questions of fact which are submitted to us in virtue of Article VIII?

Mr. PHELPS.—Yes, Sir.

Mr. CARTER.—The Government of Great Britain submitted certain findings which they desired the Tribunal to make.

The PRESIDENT.—In virtue of this article.

Mr. CARTER.—This paper is submitted by way of substitution and amendment, in certain particulars agreeing with some of those proposed findings, inserting other new ones, and amending certain ones of them, or proposing amendments to them.

Senator MORGAN.—Allow me to inquire, when the two Governments agree as to a finding, is that considered as being obligatory upon this Tribunal?

Mr. CARTER.—The Tribunal must determine that for itself, I suppose.

The PRESIDENT.—I will ask when those new questions will be argued. I suppose they are to be taken into the general, final argument of Mr. Phelps.

Mr. PHELPS.—Oh yes. We submit them now, in order that they may be passed upon or considered by my learned friends, if they desire it. We will have something to say, or at least we may have something to say, in respect to them.

The PRESIDENT.—That would be a new argument on the English side, if they did that. The British counsel were expected to speak now on regulations, but perhaps they will take this matter into consideration in the argument on the question of regulations, so as not to make two new arguments. You understand what I mean, Sir Charles?

Sir CHARLES RUSSELL.—Perfectly, sir.

The PRESIDENT.—I mean to say, if you wish to add new observations on the new submission by the United States, you will be kind enough to embody these observations in the same argument that you are going to make upon regulations.

Sir CHARLES RUSSELL.—There will be no difficulty about that, sir. As I have said, these have been handed to us now for the first time; and of course we shall require to consider them.

The PRESIDENT.—Then perhaps you will argue them after your argument on Regulations. You are going to begin on regulations immediately I believe?

Sir CHARLES RUSSELL.—I shall be able to deal with them in the course of my argument upon Regulations.

The PRESIDENT.—I think that will be the better way.

Sir CHARLES RUSSELL.—Mr. Foster, will you kindly tell me where Annex "A" to the paper you last read is to be found.

Mr. FOSTER.—It is in the British Counter Case, Appendix, Volume I, page 72; and Annex "B" is in the British Case, Appendix, Volume III, U. S. No. 2, 1890, page 65.

The Tribunal here adjourned for a short time.